

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 923.

FRANK GUINN AND J. J. BEAL

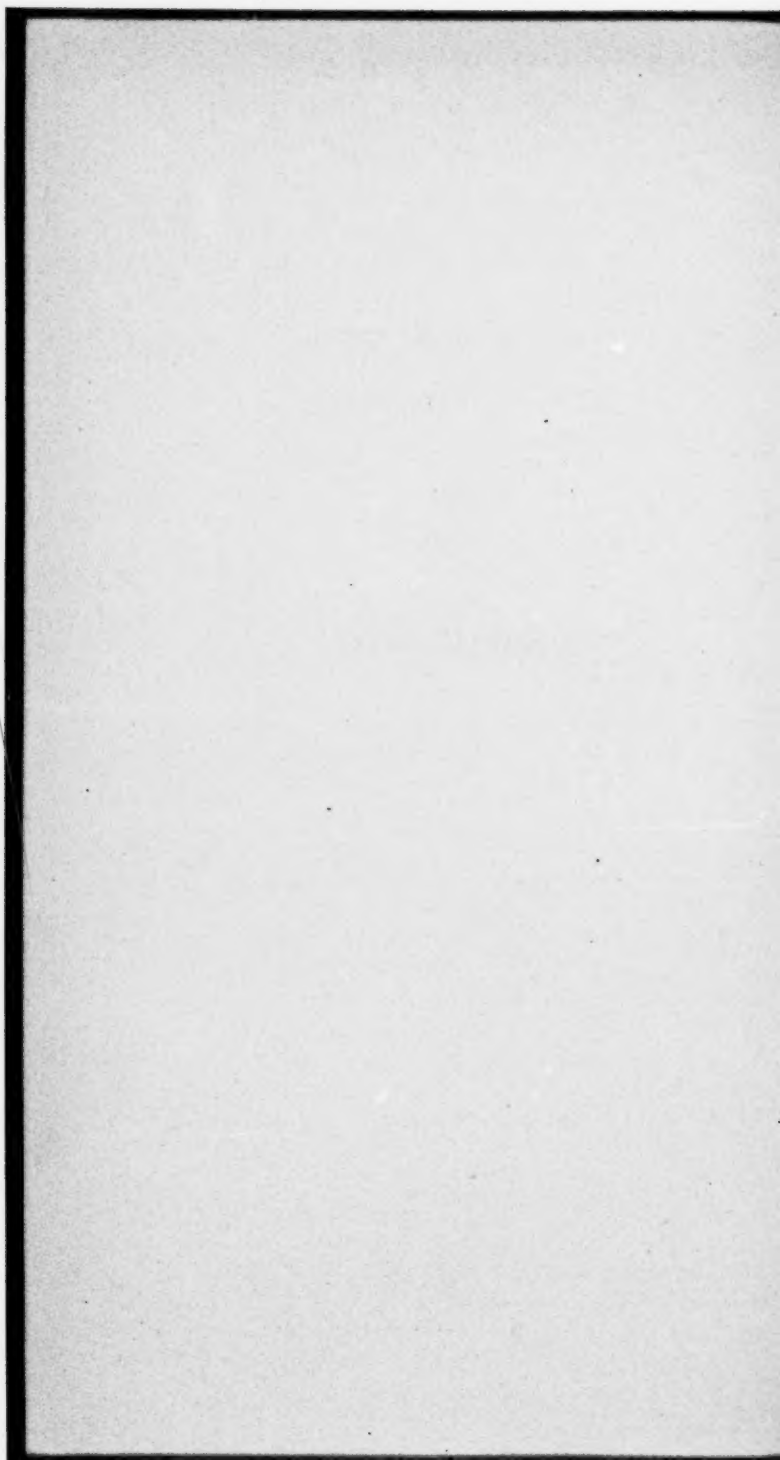
VS.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

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1 United States Circuit Court of Appeals, Eighth Circuit.

December term, A. D. 1912.

FRANK GUINN AND J. J. BEAL, PLAINTIFFS IN ERROR,
vs.
UNITED STATES OF AMERICA, DEFENDANT IN ERROR. } No. 3736.

The United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, Missouri, on the sixteenth day of December, A. D. 1912, certifies that the record in the case above entitled which is pending in this court upon a writ of error to review a judgment of conviction of Frank Guinn and J. J. Beal of the offense of wilfully and corruptly conspiring to injure, oppress, and intimidate, on account of their race and color, certain negro citizens named in the indictment, who were electors qualified to vote for a Member of Congress in the congressional district and in the precinct in Oklahoma in which they resided, in the free exercise and enjoyment of the right and privilege secured to them by the Constitution and laws of the United States to vote for a qualified candidate for such Member of Congress at the general election on November 8, 1910, in violation of section 5508 of the Revised Statutes, now section 19 of the Penal Code, discloses these facts:

2 The defendants below were duly indicted for the offense of which they were convicted; they were arraigned; they pleaded not guilty; they were tried by a jury which found a verdict against them; they were convicted and they were sentenced to serve one year in the penitentiary at Leavenworth, Kansas, and each to pay a fine of one hundred dollars, and they have sued out a writ of error to this court to review the judgment against them. The indictment charged that the defendants below wilfully and corruptly conspired together to injure, oppress, and intimidate, on account of their race and color, certain negro citizens named in the indictment who were qualified to vote for a qualified candidate for a Member of Congress in the congressional district and in the precinct in which they resided, in the full exercise and enjoyment of the right and privilege secured to each of them by the Constitution and laws of the United States to vote for a qualified person for a Member of Congress at the general election on November 8, 1910, and to prevent them from exercising that right and privilege, and from voting for a Member of Congress, and that in pursuance of said conspiracy and to effect its object the defendants below, who were members of the election board of the precinct in which the negro citizens were entitled to vote, did, by illegal oppression, intimidation, and threats deny and prevent the exercise by these negro citizens of their right to vote for a qualified candidate for a Member of Congress at the election named, although the negro citizens repeatedly demanded and sought to exercise that right and privilege at the time and place of the election in their precinct. At the trial of the case there was

substantial evidence that the defendants were members of the election board of the precinct in which the negro citizens named in the indictment resided, and that the defendants wilfully and corruptly conspired together to injure, oppress, and intimidate some of these negro citizens named in the indictment as therein charged, and that in pursuance of that conspiracy they so oppressed and intimidated them in the free exercise of their right and privilege of voting for a qualified candidate for a Member of Congress that they prevented them from exercising, deprived them of, and denied them that right and privilege.

The original constitution of the State of Oklahoma provided, with certain exceptions not material in this case, that "the qualified electors of the State shall be male citizens of the United States, male citizens of the State, and male persons of Indian descent native of the United States, who are over the age of twenty-one years, who have resided in the State one year, in the county six months, and in the election precinct thirty days next preceding the election at which any such elector offers to vote." (Constitution of Oklahoma, art. 3, sec. 1.) There was undisputed testimony at the trial that the negro citizens named in the indictment were qualified electors entitled to vote for a qualified candidate for a Member of Congress under that constitution. But in 1910, prior to the eighth day of November in that year, the day of the general election, this amendment to that constitution was adopted: "No person shall be registered as an elector of this State, or be allowed to vote in any election herein, unless he be able to read and write any section of the constitution of the State of Oklahoma. And no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution. Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officer when electors apply for ballots to vote." There was substantial testimony at the trial that several of the negro citizens named in the indictment were not, and that their lineal ancestors were not, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, and that each of them, or each of his lineal ancestors, at that time resided in the United States and was a slave; that the defendants claimed that by reason of this amendment these negro citizens were deprived of their right to vote for a qualified candidate for a Member of Congress unless they were able to read and write and unless they did read and write, in the presence of the defendants, any such section of the constitution of Oklahoma which the defendants selected. That, on the other hand, the negro citizens claimed at the election, and the United States insisted at the

trial, that the amendment was unconstitutional and void, and that the negro citizens who, the evidence introduced at the trial proved, were in all other respects qualified to vote for a qualified candidate for a Member of Congress, were qualified so to vote, although they were not able to read or write, and did not read or write any section of the constitution of Oklahoma.

The trial court, speaking of the negro citizens named in the indictment, charged the jury, among other things, in these words:

5 "As the evidence on the point is undisputed, I take it you will have no difficulty in concluding that a number, or several, of these colored voters (referring to the negro citizens named in the indictment) were entitled to vote for congressional candidates in Union Township precinct (the precinct in which they resided) and were deprived of such right. * * * The fourteenth amendment declares them to be citizens if they were born in the United States and subject to the jurisdiction thereof. If they were citizens, and otherwise qualified to vote, they had a right the same as all citizens to be not discriminated against on account of their race or color. This right is guaranteed by the fifteenth amendment to the Federal Constitution, which provided that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States on account of race, color, or previous condition of servitude.' And Congress has also provided, by section 2004, Revised Statutes, 'All citizens of the United States who are otherwise qualified by law to vote at any election by the people of any State, Territory, district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.' * * * In the opinion of the court, the State amendment which imposes the test of reading and writing any section of the State constitution as a condition to voting to persons not on or prior to January 1, 1866, entitled to vote under some form of government, or then resident in some foreign nation, or a lineal descendant of such person, is not valid, but you may consider it insofar as it was in good faith relied and acted upon by the defendants in ascertaining their intent and motive. If you believe from the evidence that the defendants formed a common design and cooperated in denying the colored voters of Union Township precinct, or any of them, entitled to vote, the privilege of voting, but this was due to a mistaken belief sincerely entertained by the defendants as to the qualifications of the voters—that is, if the motive actuating the defendants was honest, and they simply erred in the conception of their duty—then the criminal intent requisite to their guilt is wanting and they cannot be convicted. On the other hand, if they knew or believed these colored persons were entitled to vote, and their purpose was to unfairly and fraudulently deny the right of suffrage to them, or any of them, entitled thereto,

on account of their race and color, then their purpose was a corrupt one, and they cannot be shielded by their official positions."

The evidence at the trial, and the charge of the court which have been referred to in this certificate, together with the exceptions to the rulings herein mentioned, were embodied in a bill of exceptions duly settled by the court, a copy of which forms a part of the transcript of the record before this court.

The fourteenth assignment of error made by the plaintiffs in error is, "The court erred in instructing the jury as follows: 'In the opinion of the court the State amendment, which imposes the test of reading and writing any section in the constitution as a condition to voting to persons not on or prior to January 1, 1866, entitled to vote under some form of government, or as a resident of some foreign nation, or a lineal descendant of some such person, is not valid,' and an exception to this portion of the charge of the court was duly made and preserved at the time it was given."

7 And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following questions of law are presented to it in the case above entitled, that a decision of each of these questions is indispensable to a determination of the cause, and that to the end that the cause may be properly determined and disposed of, it desires the instruction of the Supreme Court of the United States upon these questions:

1. Was the amendment to the constitution of Oklahoma, heretofore set forth, valid?

2. Was that amendment void in so far as it attempted to debar from the right or privilege of voting for a qualified candidate for a Member of Congress in Oklahoma, unless they were able to read and write any section of the constitution of Oklahoma, negro citizens of the United States who were otherwise qualified to vote for a qualified candidate for a Member of Congress in that State, but who were not, and none of whose lineal ancestors was, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, because they were then slaves?

WALTER H. SANBORN,
WALTER I. SMITH,
Circuit Judges.
CHARLES A. WILLARD,
District Judge.

Filed Dec. 16, 1912. John D. Jordan, clerk.

8 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of Frank Guinn and J. J. Beal, plaintiffs in error, vs. United States of America, No. 3736, was duly filed and entered of record in my office by order of said court, and as directed

by said court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, this sixteenth day of December, A. D. 1912.

[SEAL.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court of
Appeals for the Eighth Circuit.*

9 (Indorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. December term, 1912. No. 3736. Frank Guinn and J. J. Beal, plaintiffs in error, vs. United States of America. Certificate of questions to the Supreme Court of the United States.

(Indorsement on cover:) File No. 23498. U. S. Circuit Court Appeals, 8th Circuit. Term No., 923. Frank Guinn and J. J. Beal vs. The United States. (Certificate.) Filed January 13th, 1913. File No. 23498.



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In the Supreme Court of the United States

OCTOBER TERM, 1913.

[No. 423]

FRANK GUINN AND J. J. BEAL

v.

THE UNITED STATES.

BRIEF FOR THE NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF COLORED PEOPLE.

STATEMENT OF FACTS.

This case comes before this court upon a certificate from the Circuit Court of Appeals for the Eighth Circuit asking instructions upon two questions relating to the validity of an amendment to the constitution of Oklahoma adopted in 1910 and reading as follows:—

“No person shall be registered as an elector of this State, or be allowed to vote in any election herein, unless he be able to read and write any section of the constitution of the State of Oklahoma. And no person who was on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person shall be denied the right to register and vote because of his inability to so read and write sections of such constitution.

Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officer when electors apply for ballots to vote."

Previous to this amendment, the qualifications of electors had been defined in that constitution thus (Art. III, § 1):—

"The qualified electors of the State shall be male citizens of the United States, male citizens of the State, and male persons of Indian descent native of the United States, who are over the age of twenty-one years, who have resided in the state one year, in the county six months, and in the election precinct thirty days next preceding the election at which any such elector offers to vote."

The questions certified are as follows:—

"1. Was the amendment to the constitution of Oklahoma, heretofore set forth, valid?

"2. Was that amendment void in so far as it attempted to debar from the right or privilege of voting for a qualified candidate for a Member of Congress in Oklahoma, unless they were able to read and write any section of the constitution of Oklahoma, negro citizens of the United States who were otherwise qualified to vote for a qualified candidate for a Member of Congress in that State, but who were not, and none of whose lineal ancestors was, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, because they were then slaves?"

The vital importance of these questions to every citizen of the United States, whether white or colored, seems amply to warrant the submission of this brief.

ARGUMENT.

The amendment to the constitution of Oklahoma now before the court is one of many similar provisions adopted in certain states, varying in their language but intended to accomplish the same object, and that an object forbidden by the constitution of the United States.

The provisions of that constitution are clear:—

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws” (Fourteenth Amendment, § 1).

“The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color or previous condition of servitude” (Fifteenth Amendment, § 1).

An amendment to a state constitution is a law within the language of the Fourteenth Amendment, and it certainly is action by the state.

While in terms no reference is made in the Oklahoma amendment to race or color, that amendment abridges and is intended to abridge the right of colored citizens of the United States to vote, and it imposes upon them a condition not imposed upon any other citizens of the state, thus denying them the equal protection of its laws. By its terms practically every man who is not colored may vote without the ability to read and write the constitution of Oklahoma. A great stretch of the imagination is needed in order to conceive of a white voter who does not come within the classes excepted from this requirement, while

with very insignificant exceptions, such as possible descendants of free colored men residing in the free states on January 1, 1866, every colored voter is excluded.

The language employed is just as effective as if it distinctly enforced a peculiar disqualification on all descendants of negro slaves. The purpose and effect of such amendments as this have been openly avowed, and there is not an intelligent man in the United States who is ignorant of them. If it is possible for an ingenious scrivener to accomplish that purpose by careful phrasing, the provisions of the Constitution which establish and protect the rights of some ten million colored citizens of the United States are not worth the paper on which they are written, and all constitutional safeguards are weakened.

The principles governing this case are well settled. It would hardly be contended that the Fifteenth Amendment was not violated if the constitution of Oklahoma had been amended so as to read as follows:—

“No person shall be registered as an elector of this State, or be allowed to vote in any election herein, unless he be able to read and write any section of the constitution of the State of Oklahoma. And no white person shall be denied the right to register and vote because of his inability to so read and write sections of such constitution.”

The fact that the discrimination against colored men took the shape of exempting white voters from the restriction, which the first sentence purported to impose upon all citizens alike, would be immaterial.

While the Fifteenth Amendment may not necessarily confer an affirmative right to vote, it does require in the plainest terms that, if the right is granted at all, it must be extended on the same terms to white and colored citizens alike. The well-known language of Mr. Justice Bradley

with reference to the analogous provisions of the Fourteenth Amendment is equally pertinent here:—

“It [the Fourteenth Amendment] ordains that no State shall deprive any person of life, liberty or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

“That the West Virginia statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the adminis-

tration of the law, as jurors, because of their color, though they are citizens and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."

Strauder v. West Virginia, 100 U. S. 303, 307.

The statute considered in that case did not expressly declare that colored men should not serve as jurors, but simply provided that "all white male persons" should be liable to serve as jurors, omitting all mention of negroes. It was condemned none the less.

It is likewise plain that the mere form of words is of no consequence, and that, if the effect of the provision in question is substantially the same as if it read as just suggested, the fact that the use of the words "white" and "colored" is carefully avoided is of no consequence. This rule has been repeatedly applied by this and other courts when holding invalid statutes artfully designed to accomplish purposes forbidden by the Constitution while evading the letter of its prohibitions.

In *Bailey v. Alabama*, 219 U. S. 219, it was held that § 4730 of the Code of Alabama as amended by certain statutes was repugnant to the Thirteenth Amendment, because, as the court said (at p. 238):—

"We cannot escape the conclusion that, although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt, and judging its purpose by its effect that it seeks in this way to provide the means of compulsion through which performance of such service may be secured."

In *Galveston, Harrisburg & San Antonio Railway v. Texas*, 210 U. S. 217, this court said, with reference to a statute imposing a tax upon railroad companies equal to one per cent. of their gross receipts (at p. 227):—

“A practical line can be drawn by taking the whole scheme of taxation into account. This must be done by this court as best it can. Neither the state courts nor the legislature, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce between the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form.”

In *Lochner v. New York*, 198 U. S. 45, it was said with reference to a statute limiting the hours of work in bakeries (at p. 61):—

“We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employés named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employés, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employés, if the hours of labor are not curtailed.”

In *Postal Telegraph-Cable Co. v. Taylor*, 192 U. S. 64, it was held that a municipal ordinance purporting to impose a license fee for purposes of inspection on telegraph companies was void as being, in fact, an attempt to tax interstate commerce. The court said (at p. 73): —

“Courts are not to be deceived by the mere phraseology in which the ordinance is couched.”

In *Collins v. New Hampshire*, 171 U. S. 30, it was held that a statute forbidding the sale of oleomargarine unless colored pink was unconstitutional because amounting to an absolute prohibition. The court said (at p. 33):—

“The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. *Henderson v. Mayor of New York*, 92 U. S. 259; *Morgan's Steamship Co. v. Louisiana*, 118 U. S. 455, at 462. Although under the wording of this statute the importer is permitted to sell oleomargarine freely and to any extent, provided he colors it pink, yet the permission to sell, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition.”

In *New Hampshire v. Louisiana*, 108 U. S. 76, it was held that the constitutional prohibition of suits against a state by citizens of another state cannot be evaded by bringing suit in the name of the latter state for the benefit of the real claimants.

In *Mobile v. Watson*, 116 U. S. 289, it was held that the obligations of a municipal corporation cannot be evaded by dissolving the corporation and incorporating substantially

the same people as a municipal body under a new name for the same general purposes, though the boundaries of the new corporation differ from those of the old one.

The constitution of New York (Art. X, § 2) provides that "all city, town and village officers . . . shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose." A statute abolished the police force of Troy and established the so-called "Rensselaer Police District," to be administered by officers appointed by the governor. This district consisted of the city of Troy together with three small patches of territory adjoining the city on different sides and embracing in all less than one square mile. It was held that the act was void as an attempt to evade the constitutional requirement quoted above, the court saying (at p. 55 and p. 68):—

"A written Constitution must be interpreted and effect given to it as the paramount law of the land, equally obligatory upon the legislature as upon other departments of government and individual citizens, according to its spirit and the intent of its framers, as indicated by its terms. An act violating the true intent and meaning of the instrument, although not within the letter, is as much within the purview and effect of a prohibition as if within the strict letter; and an act in evasion of the terms of the Constitution, as properly interpreted and understood, and frustrating its general and clearly expressed or necessarily implied purpose, is as clearly void as if in express terms forbidden. A thing within the intent of a Constitution or statutory enactment is, for all purposes, to be regarded as within the words and terms of the law. . . .

"The experiment in the act before us was to see with how little disturbance of the political organizations of the towns adjacent to the city of Troy, or the change of boundary lines, a police district could be established which would abide

the tests of the Constitution, and, as that is patent upon the face of the act, it cannot be sustained as a valid and effectual exercise of the power claimed to exist in the legislature, to constitute a single police district from the whole or a part of several distinct municipal organizations, each constituting a substantial part of the new district, and being within the necessities leading to its creation, and having the benefits of the new organization."

People v. Albertson, 55 N. Y. 50.

In *State v. Jones*, 66 Ohio St. 453, it was held that a statute designed to reorganize the police force of Toledo under color of regulating the police force "in cities of the third grade of the first class" was repugnant to the 13th article of the constitution of Ohio, which required that the general assembly should "pass no special act conferring corporate powers." The court said (at p. 487):—

"In view of the trivial differences in population, and of the nature of the powers conferred, it appears . . . that the present classification cannot be regarded as based upon differences in population, or upon any other real or supposed differences in local requirements. Its real basis is found in the differing views or interests of those who promote legislation for the different municipalites of the state. An intention to do that which would be violative of the organic law should not be imputed upon mere suspicion. But the body of legislation relating to this subject shows the legislative intent to substitute isolation for classification, so that all the municipalities of the state which are large enough to attract attention shall be denied the protection intended to be afforded by this section of the constitution."

In *Henderson v. Mayor of New York*, 92 U. S. 259, with reference to a statute purporting to be designed as a protection against the importation of paupers, the court said (at p. 268):—

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the *Passenger Cases* [7 How. 283]."

In *Smith v. St. Louis & Southwestern Railway*, 181 U. S. 248, the court said, with reference to certain state quarantine regulations (at p. 257):—

"What . . . is a proper quarantine law—what a proper inspection law in regard to cattle—has not been declared. Under the guise of either a regulation of commerce will not be permitted. Any pretence or masquerade will be disregarded and the true purpose of a statute ascertained."

On these principles this court has repeatedly held that it must look into the practical working of statutes purporting to establish inspection or quarantine regulations, and has declared such statutes invalid if they effect a substantial prohibition of interstate commerce or virtually impose a tax thereon, however carefully the real purpose may be concealed.

Chy Lung v. Freeman, 92 U. S. 275.

Hannibal & St. Joseph Railroad v. Husen, 95 U. S. 465, 473.

Minnesota v. Barber, 136 U. S. 313.

Brimmer v. Rebman, 138 U. S. 78.

Voight v. Wright, 141 U. S. 62.

Scott v. Donald, 165 U. S. 58, 98.

Schollenberger v. Pennsylvania, 171 U. S. 1.

In determining how far this firmly established doctrine applies to the present case, it is important to analyze the amendment to the constitution of Oklahoma now in question. In substance, this amendment provides that, without regard to educational qualifications, any adult male citizen may vote unless (1) he was on January 1, 1866, a resident of the United States, but not then entitled to vote in any state, or unless (2) he is a descendant of such a person. In other words, a negro who was born in the United States and whose ancestors may have resided here for many generations cannot vote unless he can read and write any section of the Oklahoma constitution, but a native of Siberia, for example, who resided in that country on January 1, 1866, or whose ancestors then resided there, is entitled to vote if he has been in the United States for the short period necessary to obtain naturalization, although he may be unable to read or write, and although he and all his ancestors may have been living in a state of barbarism until within five or six years ago.

This extraordinary result makes the purpose of the amendment almost too plain for argument. If it were not for the exemption of foreigners and their descendants, it might conceivably be argued that the familiarity with our institutions which may be inferred from the fact that a person is descended from one who was a voter in 1866 might have been deemed a valid reason for allowing such a person to vote, even though he could not read or write. Such a contention, it is submitted, would be altogether frivolous. The choice of January 1, 1866, as the decisive date is in itself enough to show conclusively what the real purpose of the amendment was.

But not even this flimsy argument is open as the case now stands. The effect of the amendment is to allow almost *anybody* to vote, whatever his education or extraction, unless he happens to be a negro, for it is as well known to the Court

as it was to the framers of the amendment that practically all residents of the United States, other than negroes, enjoyed the right to vote in 1866.

There is no decision by this Court tending to uphold the amendment now in question. In *Williams v. Mississippi*, 170 U. S. 213, the suffrage restrictions of the Mississippi constitution were considered. It was held that the provision that persons, who could understand the constitution when read to them, should be allowed to vote did not on its face discriminate between the races, and that, while such discrimination was possible through partiality on the part of the registrars, this possibility did not of itself offend against the Fourteenth and Fifteenth Amendments. The decision has, therefore, no application to the case at bar, since here the discrimination, if any there be, appears on the face of the amendment to the constitution of Oklahoma, and in no way depends upon the determination of the registrars or other officers. The two cases relating to the Alabama constitution—*Giles v. Harris*, 189 U. S. 475, and *Giles v. Teasley*, 193 U. S. 146—went off on questions of procedure which are of no moment in the present case, as this is a prosecution for the violation of Rev. Stat., § 5508 (now Section 19 of the Penal Code), which directly applies to such a situation.

Ex parte Yarbrough, 110 U. S. 651.

Since the case comes before this court on a certificate, the plaintiffs in error are not in a position to raise the objection taken in the Alabama cases,—i.e., that, if the scheme for registration is unconstitutional, the registrars have no right to register any one. The Court has no jurisdiction to pass upon the whole case on a certificate, and is limited to answering the precise questions of law certified.

Maynard v. Hecht, 151 U. S. 324.

Graver v. Faurot, 162 U. S. 435.

But, if the point were open, this would not help the defendants because the Alabama cases arose under a new constitution which superseded all previous provisions, so that, if the scheme of registration embodied therein was void, there was no subsisting legislation on the subject. In the present case the offending provisions are found in an amendment to the constitution of Oklahoma. If this amendment is invalid, the result is to leave unaffected the original provisions of that constitution, under which it was the duty of election officers to receive the votes of all races without discrimination.

It may be that the amendment affects adversely some few persons other than negroes. In so far as it may operate against Indians, this only strengthens the conclusion that it was intended to be a measure of racial discrimination: if it affects any other class of citizens,—*e.g.*, those who may have resided in 1866 in some state where they were not allowed to vote for want of a necessary property qualification, or who may be the descendants of such persons,—this makes it yet more clear that the amendment was not framed with any sincere purpose to obtain an intelligent electorate.

The case against the amendment is well summed up in the following extract from the opinion of Judge Morris in a case dealing with a Maryland statute of similar purport:—

“It is true that the words ‘race’ and ‘color’ are not used in the statute of Maryland, but the meaning of the law is as plain as if the very words had been made use of; and it is the meaning, intention, and effect of the law, and not its phraseology, which is important. No possible meaning for this provision has been suggested except the discrimination which by it is plainly indicated. . . .

“There are restrictions of the right of voting which might in fact operate to exclude all colored men, which would not be open to the objection of discriminating on account of

race or color. As, for instance, it is supposable that a property qualification might, in fact, result in some localities in all colored men being excluded; and the same might be the result, in some localities, from an educational test. And it could not be said, although that was the result intended, that it was a discrimination on account of race or color, but would be referable to a different test. But looking at the Constitution and laws of Maryland prior to January 1, 1868, how can it be said, with any show of reason, that any but white men could vote then? And how can the court close its eyes to the obvious fact that it is for that reason solely that the test is inserted in the Maryland act of 1908, and is not the court to take notice of the fact that, during all the 40 years since the adoption of the fifteenth amendment, colored men have been allowed to register and vote in Maryland until the enactment of the Maryland statute of 1908?"

Anderson v. Myers, 182 Fed. Rep. 223.

This Court has already taken notice of the object aimed at by a historic circumlocution in the federal constitution, and it cannot do otherwise in the case at bar.

In *People v. Compagnie Générale Transatlantique*, 107 U. S. 59, referring to Art. I, § 9 of the Constitution (which relates to "the migration or importation of such persons as any of the States now existing may think proper to admit"), the Court said:—

"There has never been any doubt that this clause had exclusive reference to persons of the African race. The two words 'migration' and 'importation' refer to the different conditions of this race as regards freedom and slavery. When the free black man came here, he migrated; when the slave came, he was imported."

Although these considerations are decisive, it may not be unprofitable to quote the language of Section 3 of the en-

abling act under which Oklahoma was admitted to the Union:—

“The constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence” (34 Stat. 269).

The present case does not call for a determination of the important question how far the requirements of the enabling act constitute a check on action by the State after its admission. If the provisions in question constitute a “distinction in civil or political rights on account of race or color,” they are necessarily “repugnant to the Constitution of the United States,” because the right to which they relate is one protected against such distinctions by the express language of the Constitution.

The enabling act is nevertheless significant as showing that Oklahoma obtained admission to the Union only with the most definite understanding that the rights of her citizens were to be in no way dependent on considerations of race or color. Indeed, the prohibition of distinctions on account of race or color indicates a desire on the part of Congress to prevent such distinctions as to *all* civil and political rights whatever,—even as to those, if any there be, not already protected by the Constitution.

If the amendment now in question can stand, it means that a state received into the Union on these stringent terms may, immediately after her admission, make sport of her solemn obligations and by a transparent subterfuge set at naught the Constitution of the United States itself. The real question for decision is whether the court is to be “deceived by the mere phraseology” into permitting such a flagrant breach of the fundamental law. To this question, it is submitted, there can be only one answer.

We respectfully urge that this is not a case where the Court should be ingenious in construing the language of the amendment in question so as to effectuate the purpose of its framers and nullify the Constitution of the United States, and that the Court should rather look through all subtleties and throw its great weight against all efforts to take away the rights which the Constitution secures to every citizen. Especially is this true now when on every hand race prejudice is exercising a most baleful influence in our affairs and in the language of Mr. Justice Bradley opposes "an impediment to securing to individuals of the [colored] race that equal justice which the law aims to secure to all others"; when, in a word, it is used to keep men down who ought to be helped up.

MOORFIELD STOREY.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. ~~400~~ 96

FRANK GUINN AND J. J. BEAL

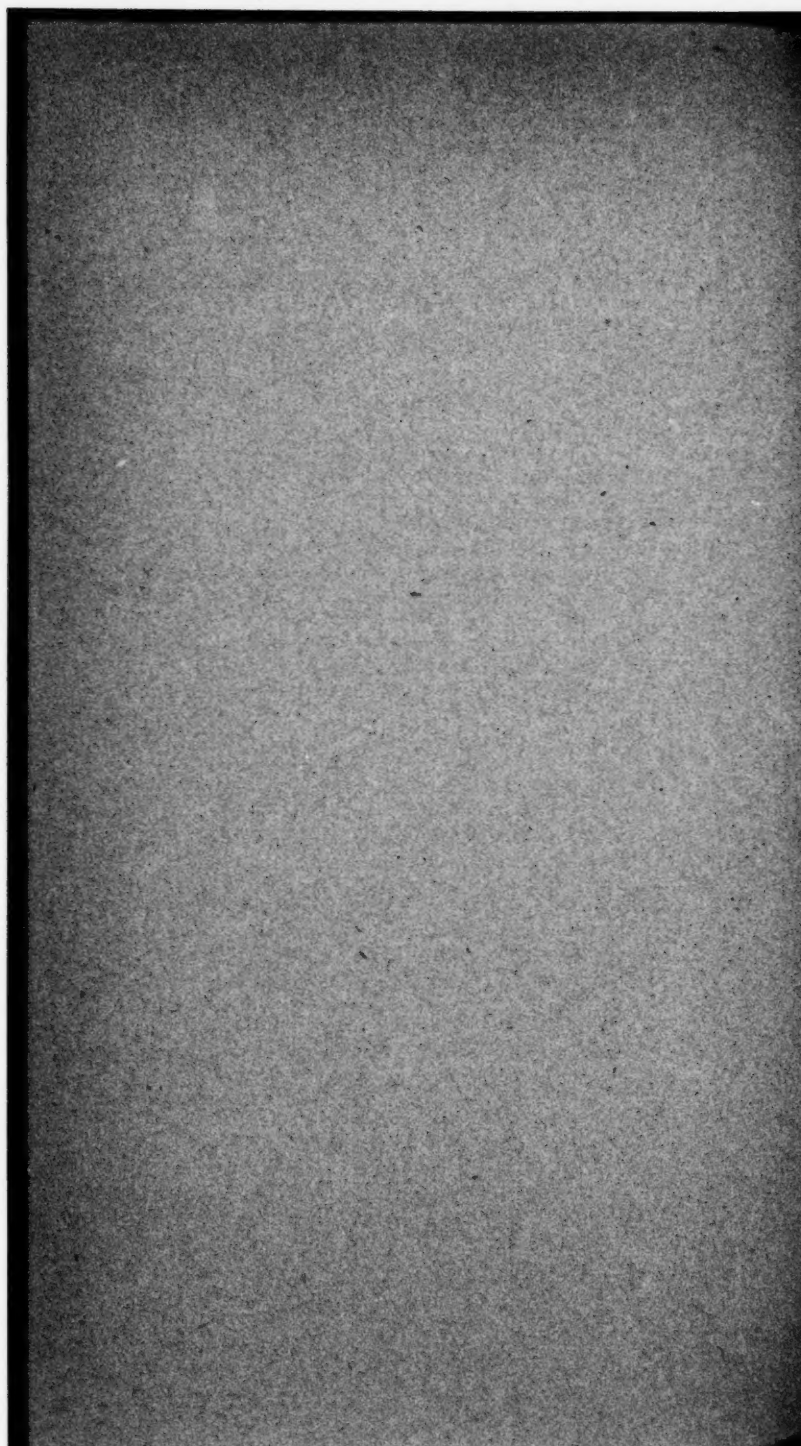
vs.

THE UNITED STATES.

**ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.**

BRIEF FOR THE APPELLANTS.

JOSEPH W. BAILEY,
Attorney for Appellants.



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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 423.

FRANK GUINN AND J. J. BEAL

vs.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE APPELLANTS.

Statement of the Case.

This case is here on a certificate from the Circuit Court of Appeals for the Eighth Circuit, and the questions on which that court has asked the opinion of this court are:

“(1.) Was the amendment to the constitution of Oklahoma, heretofore set forth, valid?”

“(2.) Was that amendment void in so far as it attempted to debar from the right or privilege of voting for a qualified candidate for a member of Congress in Oklahoma, unless they were able to read and write any section of the constitution of Oklahoma, negro citizens of the United States who were otherwise qualified to vote for a qualified candidate for a member of Congress in that State, but who were not, and none of whose lineal ancestors was, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, because they were then slaves?”

The amendment to the Oklahoma constitution to which the foregoing questions refer is:

“No person shall be registered as an elector of this State, or be allowed to vote in any election herein, unless he be able to read and write any section of the constitution of the State of Oklahoma. But no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution. Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officer when electors apply for ballots to vote.”

A comparison of this amendment with the questions of the Circuit Court of Appeals will make it apparent that the second question has not been fairly stated, for it assumes that the amendment "attempted to debar from the right or privilege of voting" illiterate negroes "who were not, and none of whose lineal ancestors was, entitled to vote under any form of government on January 1, 1866, or any time prior thereto, because they were then slaves." Certainly the language of the amendment does not warrant a statement of the question in that form, nor do the facts as related in the certificate justify that honorable court in concluding that anybody was debarred from the right or privilege of voting because they or their ancestors were slaves.

A Preliminary Question.

But before proceeding to consider the questions propounded by the Circuit Court of Appeals, I feel it my duty to call attention to a preliminary question which, under the rule of this court never to decide a constitutional question unless a proper decision of the case before it requires it to do so, renders it unnecessary to determine whether this amendment to the constitution of Oklahoma is valid or invalid.

These appellants were indicted under section 5508 of the Revised Statutes, which is section 19 of the present Penal Code, for a conspiracy to prevent certain negro citizens of Oklahoma from vot-

ing at a congressional election, and they answered that:

As election officers they could not be punished if while acting in good faith they made a mistake in administering the provisions of the election law.

I do not forget that the certificate before this court recites that the question of good faith in the execution of that law was submitted to the jury and found against these defendants; but the certificate also recites that this question of good faith was coupled with the further instruction that the law was unconstitutional, thus injecting an unnecessary and improper issue into the case. I say that such an issue was unnecessary and improper, because under the plea of good faith it was wholly immaterial whether the law was valid or invalid. It was entirely sufficient for their defense that the defendants believed it to be valid. The appellants further answered that:

They could not be properly indicted and convicted for enforcing the suffrage law of Oklahoma, without reference to their good faith, because it was their duty to obey that law, irrespective of what they thought of its constitutionality.

That is not the rule in every jurisdiction, but it is the rule in Oklahoma. In some States it has been held that an officer can excuse himself for refusing to execute a law upon the ground that it is unconstitutional, but the highest court in Oklahoma has

decided, in the case of *Cruce vs. Cease*, that no officer of that State can refuse his obedience to any law of that State upon the ground that he thinks it unconstitutional, and this court has said, in the case of *Smith vs. Indiana*, 191 U. S., 148, that whether an officer is permitted to excuse himself for refusing to obey a law of his State because he thinks it unconstitutional is purely a local question, to be determined according to the law of the State in which it arises. Therefore it was a full and perfect defense against this indictment for these defendants to answer that what they did was done under the command of a law of their State which no court of competent jurisdiction, up to the time of the transaction for which these men were indicted, had ever declared unconstitutional.

That both of these propositions were practically ignored by the trial court, and that the conviction of these appellants was based entirely upon the supposed unconstitutionality of the suffrage amendment to the Oklahoma constitution, is manifest; because otherwise the Circuit Court of Appeals would not have asked this court to advise it upon the constitutionality of that amendment.

The Solicitor General, in his brief, contends that we cannot be heard to offer these objections in this court, because we excepted to the charge of the court below upon the constitutionality of the amendment; but I am unable to comprehend by what rule of law or logic our exception in the court below could preclude us from raising this

question here. We had a right to except to that instruction, both because it was erroneous as a matter of law and also because it was not applicable to the facts in the case; but even if we had excepted to it only upon the ground that it was erroneous as a matter of law, that would not waive our right to say, nor relieve us from the duty of saying, here that, even if sound in law, it was not relevant under the facts.

ARGUMENT.

I come now to the questions certified by the Circuit Court of Appeals, and I believe that I can establish to the satisfaction of this court that this amendment to the constitution of Oklahoma is valid, though it is not necessary for me to do that, because it must stand, unless the Government can show that it conflicts with the Fifteenth Amendment to the Constitution of the United States. I am aware, of course, that in several briefs which have been filed by volunteers in this case it is contended that this amendment to the constitution of Oklahoma is repugnant to the Fourteenth Amendment to the Constitution of the United States, and my associates have devoted a very considerable part of their brief to answering that contention. They did that, however, because at the trial the District Attorney insisted that the Fourteenth Amendment had been violated, and counsel for the defendants could not anticipate that the Government would

abandon, in this court, a view which had been urged so vigorously in the court below.

The Solicitor General, however, in his brief, does not invoke the Fourteenth Amendment and relies entirely upon the Fifteenth Amendment. I, therefore, feel that it is not necessary for me to detain the court in an effort to demonstrate that the Fourteenth Amendment is not to be considered here, and I will dismiss that insistence with the remark that plainly and on its very face the Fourteenth Amendment refutes the idea that it limits, or that it was intended to limit, the right of the several States to prescribe the qualifications of their voters.

Unless the amendment to the constitution of Oklahoma, which is here under challenge, violates the Fifteenth Amendment to the Constitution of the United States, it is free from all constitutional infirmity, and reduced from a general to a particular statement, the questions certified to this court by the Circuit Court of Appeals, in effect, are:

Does the suffrage amendment to the constitution of Oklahoma violate the Fifteenth Amendment to the Constitution of the United States?

In order to answer that question fairly and satisfactorily it is, of course, necessary for us first to determine what the Fifteenth Amendment to the Federal Constitution forbids, and then determine whether the State of Oklahoma has attempted to

do any forbidden act. The Fifteenth Amendment to the Constitution of the United States declares:

“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

There has been some criticism against that amendment in so far as it seems to assume that it is “*the right*” of any person to vote, because by universal consent voting is a *privilege* rather than a *right*, and especially “citizens of the United States” have no right, as such, to vote. It is much easier, however, to justify the criticism than it would be to so word the amendment as to avoid it, without making it read more like a statutory than a constitutional provision. But whatever may be said about the phraseology of the amendment, the meaning of it is so perfectly plain that it cannot well be misunderstood. Under its prohibition neither the United States nor any State can deny or abridge the right of any citizen of the United States to vote on account of race, color, or previous condition of servitude. There can be no doubt as to the persons thus protected, or as to the acts against which they are protected; nor do I think there can be any reasonable doubt as to the extent of the protection.

Does this amendment to the constitution of Oklahoma *deny* or *abridge* the right of any citizen of

the United States to vote *on account of race, color, or previous condition of servitude*? I confidently assert that it does not, and I invite a careful examination of its language. In order that we may better understand the effect of the amendment, perhaps it would be well for us to read the original suffrage provision. The Constitution under which Oklahoma was admitted into the Union provided, with certain exceptions not essential in this connection, that—

“The qualified electors of the State shall be male citizens of the United States, male citizens of the State, and male persons of Indian descent, natives of the United States, who are over the age of twenty-one years, and have resided in the State one year, in the county six months, and in the election precinct thirty days next preceding the election at which any such elector offers to vote.”

In 1910 the legislature of Oklahoma submitted, and the people adopted, the following amendment:

“No person shall be registered as an elector of this State, or be allowed to vote in any election herein, unless he be able to read and write any section of the constitution of the State of Oklahoma. But no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his

inability to so read and write sections of such constitution. Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officer when electors apply for ballots to vote."

Before the adoption of the foregoing amendment, every man in Oklahoma, twenty-one years of age and possessing certain qualifications of citizenship and residence, could vote; but the first sentence of that amendment requires that, in addition to the qualifications theretofore sufficient, each voter shall be able to read and write any section of the Oklahoma constitution. It is apparent, therefore, that this first sentence *abridges* the right of suffrage in that State; but as that abridgment is not based upon race, color, or previous condition of servitude it is perfectly valid. Indeed, the brief of the Solicitor General admits its validity, and concedes that if it stood alone it could not be successfully assailed; but he contends that the exception contained in the second sentence renders the entire amendment void. Thus analyzed and still further reduced, the single and the simple issue which confronts us in this case is:

Does the exception contained in the second sentence of this amendment to the constitution of Oklahoma deny or abridge the right of any citizen of the United States to vote on account of his race, color, or previous condition of servitude?

According to its clear and unequivocal import that second sentence does not deny or abridge the right of any citizen to vote. Certainly it does not do so in words, and there is no rule of construction by which it can be tortured into doing so through its effect. No law, and no part of any law, can be said to deny or abridge the right to vote, unless it takes that right away or restricts it in some degree. Does this exception take away any citizen's right to vote, or does it restrict that right in any manner whatever? It does neither, and it was incorporated into the amendment for the very purpose of enabling some men to vote who would be unable to vote without it. Could any difference be wider, or could any difference be plainer than that which must exist between one provision which enables and another provision which disables? The two are as wide apart as an affirmative and a negative.

Let us separate the exception which is claimed to vitiate this amendment from everything else and see if we can make it answer our question. This is the way it reads:

"But no person who was on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote, because of his inability to read and write any section of the constitution."

Here is an express declaration that "no person" who comes within the terms of this exception "shall be denied the right to register and vote," and yet this court is urged to decide that this sentence does not mean what it says, and that, although in words it expressly provides that those within its terms *shall not be denied* the right to register and vote, it really means that those not within its terms *shall be denied* the right to register and vote.

This could not be sound logic, because the "shall not" which works the abridgment was spoken before this exception was ever written; and every man whose right to vote is abridged by this amendment suffers under the first sentence of it, and not under the second sentence of it. Every man who looks to the second sentence does so only in the hope of finding that it will relieve him from the disability to which the first sentence subjects him. A moment's reflection upon the method of enforcing this amendment will be sufficient to satisfy us on this point. When a citizen, possessing the requisite age, citizenship, and residence, offers to vote, he must satisfy the election officers that he can read and write any section of the constitution, and he is permitted to vote. If, however, he can-

not read and write any section of the constitution, the election officers then look to the exception to see whether or not he comes within it; but they look to that exception merely to see if it will enable the citizen to vote, and never to see whether it deprives him of that privilege.

Let me state the same proposition in a different form. This exception could not deny or abridge any man's right to vote, because it permits every man possessing the qualifications prescribed in the original constitution and who can read and write, as required by the amendment, to vote precisely as he could have voted if this exception constituted no part of the amendment. In other words, this exception gives some men the right to vote whose right the general rule would deny, but it does not deny the right of a single living man to vote who would be permitted to vote under the general rule if the exception had never been written into the amendment.

A Discrimination, Not an Abridgement.

The exception undoubtedly discriminates in favor of all who come within its terms, and it may constitute a denial of the equal protection of the law as to those who do not come within its terms. If, therefore, the Fourteenth Amendment applied to the question of suffrage, this exception might be invalid under the equal-protection clause of that amendment; but the Fourteenth Amendment does

not apply to questions of suffrage, and, consequently, this court can not condemn this amendment to the Oklahoma constitution, because it discriminates in favor of one class, and thus denies the equal protection of the law to other classes.

I am not unmindful of the fact that beginning with the Reese case various members of this honorable court have said from time to time that the Fifteenth Amendment secures, and was designed to secure, our negro citizens against discrimination. Those statements, however, have in every instance been made by way of argument, and for the purpose of that argument they were accurate enough; but when we come to deal with the precise question, a much greater accuracy is demanded. Indeed, nothing less than absolute accuracy will suffice here. This court has never decided that the Fifteenth Amendment secures, or was intended to secure, our negro citizens against discrimination; and, in my judgment, it will never do so, because it cannot so decide without reading into the Constitution words which are not there, or attaching to the words which are there a meaning which they do not convey, according to any dictionary, legal or literary, ever yet published. Deny does not mean discriminate. Abridge does not mean discriminate. Undoubtedly it would be possible to frame a discriminating law which would deny or abridge; but in that case the law so framed would be void, not because it discriminated, but because it denied or abridged. If the State grants to me a privilege

to which I am entitled under the Constitution of the United States, it does not then abridge or deny my right by granting a greater privilege to my neighbor, and the latter grant would be plainly within the competence of the State, except for the Fourteenth Amendment, which does not apply to or control the case at bar.

Having enacted valid laws under which the privilege of voting may be exercised within its jurisdiction, a State has the right to exempt any of her citizens from the operation of those laws, even though the exemption be made "on account of race, color, or previous condition of servitude;" and Oklahoma having established a general rule of suffrage which accords with the Fifteenth Amendment to the Federal Constitution, can, if she so desires, exempt all of her Indian inhabitants from the exactions of that rule expressly on account of their race. It is known to all intelligent men in that State that a very considerable part of its population is composed of Indians who have long been under the guardianship of the General Government, and have been permitted to grow up in utter ignorance of the English language, in which the constitution of Oklahoma is written. Recognizing that unfortunate condition, the State, after having prescribed her qualifications of age, sex, citizenship, and residence, and after adding to those qualifications the requirement that every voter shall be able to read and write any section of her constitution, might have deliberately provided that all men

of the Indian race, otherwise qualified, could vote notwithstanding they are unable to read and write.

If any Northern State, having either a property or an educational qualification should see fit to do so, it could dispense with those requirements as they affect men of the negro race. The State of Massachusetts might well have said after the adoption of the Fifteenth Amendment that, while adhering to her educational qualification for all other voters, she would exempt the lately emancipated slaves from it upon the ground that the condition of slavery precluded them from obtaining an education. Would the exemption thus extended to the Indian specifically on account of his race by the State of Oklahoma, or the exemption extended to the negro specifically on account of his previous condition of servitude by the State of Massachusetts, have denied or abridged the right of any other man in either State to vote? Would not every man in both States be able to vote under their general rule precisely the same as he could have done if no exemption had been extended to the Indian in Oklahoma, or to the negro in Massachusetts? Is it not plain that the exemption would merely enlarge the right of the Indian in the one case and the negro in the other, without denying or abridging, in the least, the right of others?

Every man in Oklahoma who could vote under this amendment, if it did not contain the exception, can vote notwithstanding the exception; and since the Solicitor General admits that the amendment

would be valid without the exception, how can he ask this court to hold that this exception invalidates the amendment, in the face of the fact that it does not prevent a single man in all the State of Oklahoma from voting? The only denial or abridgment of the right to vote which can be found in this amendment to the constitution of Oklahoma is contained in its first sentence which withdraws the franchise from all of those who were qualified to vote at the time of its adoption, unless they are able to read and write any section of that State's constitution; and every man in that State whose right to vote is denied or abridged will find that denial or abridgment imposed upon him by the original constitution, which has not been assailed, supplemented by the first sentence of the amendment, which the Solicitor General freely acknowledges to be valid. The argument of the Government then presents the strange inconsistency of admitting the validity of that part of the amendment which actually denies or abridges the right of certain people to vote, while disputing the validity of that part which does not deny or abridge the right of any man to vote, but actually enlarges the right of all who come within its terms.

Purpose of the Amendment.

But in answer to all this we are told that, while the exception on its face appears merely to enlarge the right of some men to vote, it was contrived with the deliberate purpose of disfranchising the ne-

groes, and that if sustained it must inevitably produce that effect. On page 12 of his brief the Solicitor General says:

“Of course, this grandfather clause does not use any adjective of color and does not designate any race or refer in express terms to any previous condition of servitude. If it read that ‘all illiterate persons who on January 1, 1866, or at any time prior thereto, were not entitled to vote because of their race, color, or previous condition of servitude * * * shall be denied the right to register and vote,’ no one would dispute its unconstitutionality. In effect, though not in words, it says just that. In law, as in mathematics, things which are equal to the same thing are necessarily equal to each other; and the meaning of a phrase, not the words in which it happens to be couched, must be considered.”

That does not bring us any nearer to a sound conclusion, because the exception does not read that “all illiterate persons who, on January 1, 1866, or at any time prior thereto, were not entitled to vote on account of their race, color, or previous condition of servitude * * * shall be denied the right to register and vote.” It does not say that, either in words, or in substance, or in effect. I could allow all that the Solicitor General can claim for his argument in this particular respect by conceding that the State, having made an exception to its general rule, could not then, on account of his “race, color, or previous condition of servitude,”

exclude from that exception any person who comes within it; but that concession would not help the Government's case, because this exception does not itself contain any exception, and therefore does not, for any reason, deny its benefits to any person who comes within its terms. In the case which the Solicitor General supposes certain persons would be excluded expressly on account of their race, color, or previous condition of servitude; but he cannot find any such disqualifying clause in the Oklahoma amendment, for even the exception extends its privilege to all who come within it, without regard to their "race, color, or previous condition of servitude," and the fact that some negroes are not within its terms can no more invalidate it than the other fact that some white men are not within them.

But even if it were true that the legislature which drafted and the people who adopted this amendment did so with the settled purpose in their minds of disqualifying the negroes of Oklahoma, still this court could not pronounce that amendment void, because—

No enactment which is valid on its face can be held invalid by this court on account of the unlawful motives or purposes which are supposed to have actuated those by whom it was enacted.

There are those who doubt the wisdom of that rule and who think that under proper allegations and proof the court should be permitted to inquire

into questions of that kind; but whether the rule be wise or otherwise it is the rule in this court, and it was explicitly laid down in the case of *McCray vs. The United States*, which was decided within the last ten years, and in which it was declared:

“It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the Government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power.”

Of course, I understand that the law under consideration in that case was one passed by Congress, and I know it has sometimes been said that this court is not required to apply the same rule to State statutes or State constitutions as it applies to the laws of Congress; but certainly no good reason for such a distinction can be given. It is proper that the courts should indulge every reasonable presumption that Congress will not exceed its powers, for such a consideration is due from one branch of the Federal Government to the other: but surely a constitutional amendment, which was drafted first by the legislature of a State and then

adopted by a solemn act of the people, is entitled, in this court, to a consideration no less respectful than is accorded to the proceedings of Congress.

Without controverting my proposition that the court cannot hold an enactment which is valid on its face invalid because of the motives or purposes behind it, the Solicitor General evades it by stating another rule of law, and on page 24 of his brief he lays down the following:

“The necessary effect and operation of a State statute or constitutional amendment may be considered in determining its validity under the Federal Constitution.”

I do not controvert that proposition, and it is not necessary for me to do so in this case, because it is inapplicable. Even if it were true that “the necessary effect and operation” of this amendment is to deny or abridge the right of a man to vote on account of his “race, color, or previous condition of servitude,” that fact cannot be ascertained from the face of it and could only be established by evidence outside of it. It is this circumstance which removes this amendment from the rule laid down by the Solicitor General and brings it within the rule laid down by me.

The cases cited by the Solicitor General undoubtedly sustain the contention that the court can consider the “necessary effect and operation” of a State statute or a State constitutional provision in determining whether such statute or such constitu-

tional provision is repugnant to the Constitution of the United States; but those cases will be searched in vain for the slightest intimation that this court can go beyond the face of a statute or a constitutional amendment and inquire into the purposes or motives which induced its adoption.

The first case discussed in this connection is that of *The Home Insurance Company vs. New York*, 134 U. S., and while the quotation from it is, of course, literally accurate it does not justify any conclusion which is material to this case. There is no suggestion in that opinion that this court can nullify the law of a State upon evidence that it was designed to accomplish an unlawful end, and the statute which was there called in question was held a valid exercise of its power by the State.

The second case on which the Solicitor General relies is that of *Yick Wo vs. Hopkins*, 118 U. S. The court held there that the statute of California, on its face, armed the officers authorized to enforce it with a power so arbitrary as to amount to a denial of the equal protection of the law, and in reaching that conclusion it rejected—what it seldom does—the construction of a State law announced by the highest court of that State. The quotation from that case which appears in the brief of the Solicitor General, standing alone, would seem to assert that this court would declare void the law of a State “fair on its face and impartial in appearance,” because it was “applied and administered by the public authority with an

evil eye and an unequal hand." Of course, this court never intended to announce such a doctrine, for it would be an absurdity to say that a valid law could be rendered invalid by the manner of its enforcement. This court meant no more by the language which the learned Solicitor General has quoted than to say that the administration of the law might be such as to deprive certain persons of the equal protection of the law, and therefore within the prohibition of the Fourteenth Amendment to the Federal Constitution. I do not overlook the fact that in passing upon the statute according to its terms the court condemned it as necessarily involving a denial of the equal protection of the laws; but in that part of the opinion to which the Solicitor General invites the attention of the court the learned justice who delivered that opinion was discussing another branch of the proposition, and he there declared, in addition to what he had said about the law itself, that the method of its enforcement violated the equal protection clause of the Fourteenth Amendment, and, therefore, even if the statute itself were valid, the acts of the officer done under the color of its authority were repugnant to the Federal Constitution and void.

The third case relied on by the Solicitor General in his brief is that of *Bailey vs. Alabama*, 219 U. S., but the prevailing opinion in that case does not give any countenance to the doctrine that this court can look beyond the language of a State statute and condemn it on account of the motives which in-

spired its enactment. In fact, that opinion, as I understand it, held the Alabama law void on its face, because, though it pretended to accomplish a lawful object, it accomplished in its necessary operation and effect a different and unlawful object. Indeed, the opinion, even in the quotation which the learned Solicitor General makes from it, expressly declares that—

“Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question (*Henderson vs. Mayor*, 92 U. S., p. 268), and it is apparent that it furnishes a convenient instrument for the coercion of which the Constitution and the act of Congress forbids.”

There is not the remotest suggestion there of an inquiry into the motives of the legislators who enacted that law, but the decision rested on the face of the law itself.

The process of reasoning which conducted the court to its conclusion in all of the cases relied upon by the Solicitor General is very different from that which the court is invited to follow in this case, and nothing could better illustrate that difference than the brief of the Solicitor General himself. He does not confine his argument against the amendment to the language of it, but he lays before the court facts drawn from various sources to show that the purpose in the minds of those who adopted that amendment was an unlawful one. He enters into an elaborate discussion, based upon the census

of the United States, as to the relative number of negroes and white people in the State of Oklahoma; and as if to emphasize the danger of such an argument, he makes the mistake of incorrectly stating the number of States in which negroes had been permitted to vote prior to January, 1866. I do not, of course, mean to impute to the Solicitor General any intention to mislead the court, but the list of States which he gives as permitting the negro to vote is less than one-half of those in which negroes enjoyed that privilege.

In order to confirm my interpretation of the three cases relied on by the Solicitor General, I will reproduce from his brief his own extract from the case *Soon Hing vs. Crowley*, 113 U. S. The Solicitor General avers that this Crowley case does not limit or qualify the rule for which he contends; but according to my view it completely negatives, at least, the application of his rule to this case, and completely establishes my rule as the one by which it must be governed. Here it is exactly as it appears in the Solicitor General's brief, stars, italics, and all:

“* * * There is nothing, however, in the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. And the rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or in-

ferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile. And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretence (pp. 710-711)."

"The rule is general with reference to the enactment of all legislative bodies that the courts cannot inquire into the motives of the legislatures in passing them, except as they may be disclosed on the face of the acts or inferable from their operation, considered with reference to the condition of the country and existing legislation"; and according to that general rule no evidence can be introduced from obsolete State constitutions or from census reports for the purpose of impeaching the motives or purposes of the Oklahoma legislature in submitting this amendment, or the Oklahoma people in adopting it.

But there is still a stronger case, and a case more directly in point, even than that of *Soon Hing vs. Crowley*. The same assault which is made here upon the constitution of Oklahoma was made upon the constitution of Mississippi in the *Williams* case. It is true that the constitution in that case was not in all respects like the constitution involved in this case, and the question there was one of jury service, depending on the right to vote; but the same charge that it was intended to disfranchise the negroes was made against it. In the case of *Ratcliff vs. Beal*, the Supreme Court of Mississippi was called upon to consider this question, and with a candor which does it infinite credit that tribunal did not attempt to disguise the purpose which the constitutional convention of Mississippi had sought to accomplish. Here is the way it met the allegation:

“Within the field of permissible action under the limitations imposed by the Federal Constitution, the convention swept the field of expedients, to obstruct the exercise of suffrage by the negro race.”

And further the court said, speaking of the negro race:

“By reason of its previous condition of servitude and dependencies, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from the whites. A patient, docile people; but careless, landless, migratory within

narrow limits, without forethought; and its criminal members given to furtive offenses, rather than the robust crimes of the whites. Restrained by the Federal Constitution from discriminating against the negro race, the convention discriminates against its characteristics, and the offenses to which its criminal members are prone."

With this frank admission of the Mississippi court before him, the learned justice who delivered the opinion in the Williams case declared:

"But nothing tangible can be deduced from this. If weakness were to be taken advantage of, it was to be done 'within the field of permissible action under the limitations imposed by the Federal Constitution,' and the means of it were the alleged characteristics of the negro race, not in the administration of the law by the officers of the State. Besides, the operation of the constitution and laws is not limited by their language or affects to one race. They reach weak and vicious white men, as well as weak and vicious black men, and whatever is sinister in their intention, if anything, can be prevented by both races by the assertion of that duty which voluntarily pays taxes and refrains from crime."

Williams vs. Mississippi, 195 U. S.

So we say, in defense of the Oklahoma constitution, that its "operation is not limited by its language or affects to one race." Both its abridgments and its exemptions apply to white men as well as black men, and whatever is sinister in their

intentions, if any thing, can be easily escaped by both races, if only they will learn to read and write.

A distinguished lawyer in a brief which he has volunteered in this case declares that if this amendment to the constitution of Oklahoma is held valid, then "the provisions of the Constitution which establish and protect the rights of some ten million colored citizens of the United States are not worth the paper on which they are written;" but I venture to say that he was moved more by his zeal than by his judgment to make that declaration. It is of a kind with much that was said against the decision of this court in the Slaughter House cases, but the men who prophesied that the Fourteenth Amendment would be emasculated and the purpose of it defeated by that decision all lived to see their prophecies falsified, and were compelled to admit that the Fourteenth Amendment, as construed in that decision, has served the purposes for which it was designed.

The Fifteenth Amendment to the Constitution of the United States, as I read it, and as I think this court ought to construe it, will do all that its authors intended it to do, or expected it to do; for as so read and as so construed, it has forever rendered it impossible for any State to adopt qualifications for the elective franchise with which a man's race, color, or previous condition of servitude renders it impossible for him to comply. That was all which the authors of this amendment desired or expected to accomplish by it, and beyond that they left the regulation of its suffrage to every

State precisely as it had existed from the organization of the Republic.

If the State of Oklahoma had a right to say that no person could vote in any of her elections unless he could read and write any section of her constitution—and it is admitted that in so saying she would not deny or abridge the right of any person to vote on account of his “race, color, or previous condition of servitude”—by what process of reasoning then can we conclude that the Fifteenth Amendment to the Federal Constitution forbids her to except any class of citizens from that rule? The exception does not deny or abridge; and if it does not, then it cannot conflict with the Fifteenth Amendment. It may be true, and undoubtedly it is true, that to except some people from the operation of the rule while leaving other people subject to its operation would be such a denial of the equal protection of the laws as is forbidden by the Fourteenth Amendment; but I repeat for the third time that the Fourteenth Amendment which prohibits such a discrimination does not apply to this case, and the Fifteenth Amendment, which applies to this case ~~only~~ does not touch the question of a mere discrimination, and prohibits a denial or an abridgment only on account of race, color, or previous condition of servitude.

Under this amendment every man in Oklahoma of the required age, residence, and citizenship who can read and write any section of her constitution is permitted to vote, no matter what his “race, color, or previous condition of servitude” may be.

If he can fulfill that requirement, the black man, or the red man, or the yellow man, can vote precisely the same as the white man. It is no answer to this admitted fact for the Government to say that many white men and only a few negroes are embraced within the terms of the exception. The constitutionality of this amendment cannot be determined by a count of heads, and the fact that it may include some negroes and may exclude some white men is irrefragable proof that it does not deny or abridge the right to vote on account of race, color, or previous condition of servitude. That amendment only demands something which every man can learn to do and which every man should learn to do; something which will not only qualify him the better to exercise the privilege of voting, but will also prepare him the better to provide for himself and those dependent on him. It erects a standard which men of every "race, color, and previous condition of servitude" may attain, and in the attainment of which they are helping themselves as well as the State.

Conclusion.

I, therefore, submit that if this court shall deem it proper to answer the questions certified by the Circuit Court of Appeals for the Eighth Circuit, it should answer the first question in the affirmative and the second question in the negative.

JOSEPH W. BAILEY,
Attorney for Appellants.

In The
Supreme Court of the United States

FRANK GUINN and J. J. BEAL

vs.

THE UNITED STATES

} No. 423

BRIEF OF J. H. ADRIAANS AS AMICUS CURIAE

The appellants Guinn and Beal were convicted upon an indictment charging that they "wilfully and corruptly conspired together to injure, oppress, and intimidate, on account of their race and color, certain negro citizens named in the indictment, who were qualified to vote for a qualified candidate for a Member of Congress in the congressional district and in the precinct in which they resided, in the full exercise and enjoyment of the right and privilege secured to each of them by the Constitution and laws of the United States to vote for a qualified person for a Member of Congress at the general election on November 8, 1910, and to prevent them from exercising that right and privilege, and from voting for a Member of Congress, and that in pursuance of said conspiracy and to effect its object, the defendants below, who were members of the election board of the precinct in which the negro citizens were entitled to vote, did, by illegal oppression, intimidation, and threats, deny and prevent the exercise by these negro citizens of their rights to vote for a qualified candidate for a Member of Congress at the election named, although the negro citizens repeatedly demanded and sought to exercise that right and privilege at the time and place of the election in their precinct."

From the record it further appears that appellants "were members of the election board of the precinct in which the negro citizens named in the indictment resided" (Union Township); and that their action was based upon an amendment to the State Constitution in 1910 whereby it was provided:

"No person shall be registered as an elector of this State, or be allowed to vote in any election herein unless he be able to read and write any section of the constitution of the State of Oklahoma. And no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution. Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officer when electors apply for ballots to vote."

The Court, in its charge to the jury, stated that the Fourteenth Amendment declares them (the persons named in the indictment) to be citizens if they were born in the United States and subject to the jurisdiction thereof * * * "This right is guaranteed by the Fifteenth Amendment to the Federal Constitution, which provided that

'the right of the citizens of the United States to vote shall not be denied or abridged by the United States on account of race, color, or previous condition of servitude.'

The Court also referred to Section 2004 Revised Statutes:

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people of any State, Territory, District, Municipality, or other Territorial Sub-Division, shall be entitled and allowed to vote at all such elections without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

The lower Court finally certifies to this Court for answer two questions:

1. Was the amendment to the constitution of Oklahoma, heretofore set forth, valid?

2. Was that amendment void insofar as it attempted to debar from the right or privilege of voting for a qualified candidate for a Member of Congress in Oklahoma, unless they were able to read and write any section of the constitution of Oklahoma, negro citizens of the United States who were otherwise qualified to vote for a qualified candidate for a Member of Congress in that State, but who were not, and none of whose lineal ancestors was, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, because they were then slaves?

To express the case at bar in condensed language, the appellants, as members of the election board of Union Township, Oklahoma, are confronted in the performance of their duties by two tests of the right to vote; one prescribed by the State in the amended Constitution of 1910 and one by the Federal Government, embodied in Amendments 14 and 15 to its Constitution. These two tests are claimed by the trial and appellate Courts to be inharmonious, repugnant to each other, irreconcilable, and that the State test, because it conflicted with the Federal test, must yield and be subordinated to the latter, and to the extent of repugnancy must be deemed invalid, and of insufficient justification to the appellants to do the acts complained of in the indictment, and that because of doing the acts complained of without sufficient warrant, the conviction below should be sustained by this Court; the first question in the Certificate should be negatively answered, and that the second question in the Certificate should be affirmatively answered. To express the matter otherwise, the guilt or innocence of the appellants depend upon the character of answer this Court shall give to the two certified questions. If the first question is judicially answered "yes" and the second question judicially answered "no," the appellants have committed no offense against the United States, and the indictment should be quashed and the conviction reversed.

How shall these questions certified be answered?

No student familiar with the history of the United States will question that the Colonies, before the formation of the Union or the States thereafter, prescribed tests of citizenship

within the Colony or State, and that a person possessing the requisite State qualifications was, by reason of that fact solely, a citizen of the Nation in which the State was a component part. Familiar illustrations of this are the residence, tax, criminal, and educational tests, common to practically every State in the Union. From 1776 to 1868, every State had the unquestioned right to prescribe tests of franchise within its border, as well for State as National elections. An elector of the State was, for that reason, accepted as an elector of the Nation. The latter, during this period, never asserted a right to transfer this power from the State to the Federal Government. The Declaration of Independence (July 4, 1776) did not hint at such withdrawal of power from the States and its lodgment with the Federal Government. The Articles of Confederation (July 9, 1778) will be scanned in vain for any such abstraction of power from the States. The Ordinance of 1787 (July 13) is silent on that subject. The Constitution (March 4, 1789) in its distribution of powers to the executive, legislative, and judicial departments, makes no provision for transferring this power from the State to the Nation. Article 1, Section 2 contrarily provides:

"The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature."

In other words, any elector qualified to vote for a candidate for the most numerous branch of the State Legislature, was competent to vote for a representative in Congress, or a President at a national election. In the enumeration of 25 powers granted to Congress by the Constitution, prescribed in Section 8 of Article 1, thereof, with the 11 limitations in the exercise of such powers specified in Section 9 of Article 1, no mention is made of the power to prescribe tests of franchise by the Federal Government. All powers not granted were reserved by the States. So that very little, if any, doubt, can be entertained that up to March 4, 1789, any test of franchise, such as is before the Court in the amendment of 1910 to the Oklahoma Constitution, prescribed by a State—even if it applied to a National election—would be within its reserved power, obedience to which would not justify the indictment of its citizens in the Federal Court. Even after the proclamation of the 14th and 15th Amendments the Federal Courts have conceded (*McKay vs. Campbell*, 1 Sawyer 374; *U. S. vs. Anthony*, 5

Chicago Legal News, 462) that the States were shorn of the powers theretofore possessed by them of creating tests of franchise only to the extent that such tests conflicted with the 14th and 15th Amendments. These decisions moreover assume the validity of these Amendments, and make no pretense of testing them by Article 5 of the original Constitution—as will be done later in the present brief. The trial Court practically concedes the foregoing in its charge to the jury, but founds its criticism upon the Amendment of 1910 to the circumstance that it is repugnant to and inconsistent with Amendments 14 and 15 to the Federal Constitution, and that the Amendment of 1910 to the Oklahoma Constitution is for this reason invalid, null and void. The object of the present brief is to advise the Court that the Oklahoma Amendment of 1910 may be valid notwithstanding it conflicts with Federal Amendments 14 and 15, because the latter do not conform to Article 5 of the original Constitution, and hence are no part of the Federal Constitution.

This Court has never heretofore, in any recorded decision, analyzed and dissected Amendments 14 and 15 to the Federal Constitution to ascertain if they conform to Article 5, and from the vast importance of the subject to the three coordinate branches of this government, and to the people of this country, in their internal relations to each other, as well as in their external relations to the peoples of other Governments, it is an appropriate time that this Court should examine into this question for the first time—the war era (which gave birth to these alleged Amendments) having sufficiently passed to do this calmly.

It has been established by a long line of decisions in this Court that judicial notice may be taken by the Federal Courts of the Constitution, laws and treaties of the United States; see for example:

- Marbury vs. Madison, 1 Cranch, 137.
- Owings vs. Hull, 9 Peters, 607.
- Bank vs. Earle, 13 Peters, 519.
- United States vs. Reynes, 9 Howard, 127.
- Sparrow vs. Strong, 3 Wallace, 97.
- Gardner vs. Collector, 6 Wallace, 499.
- Furman vs. Nichols, 8 Wallace, 44.
- Railroad Co. vs. Bank, 12 Wallace, 226.
- Brown vs. Piper, 91 United States, 37.
- Ottawa vs. Perkins, 94 United States, 260.

Blake vs. United States, 103 United States, 227.
 Brown vs. Colorado, 106 United States, 95.
 Lamar vs. Micou, 114 United States, 218.
 Hoyt vs. Russell, 117 United States, 401.
 United States vs. Rauscher, 119 United States, 407.
 Bank vs. Francklyn, 120 United States, 747.
 Case vs. Kelley, 133 United States, 21.
 Minn. vs. Barber, 136 United States, 313.
 Jones vs. United States, 137 United States, 202.
 Gormley vs. Bunyan, 138 United States, 623.
 Gerling vs. R. R. Co., 151 United States, 673.
 Mills vs. Green, 159 United States, 651.
 R. R. Co. vs. Ziegler, 167 United States, 65.
 Ins. Co. vs. McGrew, 188 United States, 291.
 B. & L. Assn. vs. Williamson, 189 United States, 122.
 Cosmos Co. vs. Oil Co., 190 United States, 301.
 Dimmick vs. Tompkins, 194 United States, 540.
 United States vs. Whitridge, 197 United States, 135.
 Manigault vs. Springs, 199 United States, 473.
 Gardner vs. Mich., 199 United States 325.
 United States vs. Root Co., 200 United States 451.
 R. R. Co. vs. Powers, 201 United States, 245.

It thus appearing that the Court, *sua sponte*, has the privilege of examining into legislation of Congress to ascertain if it is consonant with the Constitution; and the Court on numerous occasions having exercised this power; see for example:

Scott vs. Sanford, 19 Howard, 393.
 Trade-Mark Cases, 101 United States, 705.
 Pollock vs. Trust Co., 157 United States, 429.
 Pollock vs. Trust Co., 158 United States, 601.

It would afford justification to the Court and great relief to the Country, if the Court would on this occasion examine into, and set at rest, all questions concerning the validity of the Fourteenth and Fifteenth Amendments; as it has heretofore done with respect to the Eleventh Amendment (Hollingsworth vs. Va., 3 Dallas, 381).

It is quite true that this Court has, on numerous occasions, considered the Fourteenth Amendment, but never as to the question of validity. The subjoined list of cases attests that this Court has measured litigation coming before it since the war, by the Fourteenth Amendment as an infallible judicial yardstick. The Court has been led to believe that this meas-

ure is true, whereas it can be shown to be false; that it was genuine, whereas it bears all the earmarks of a counterfeit; that it was of lawful origin, whereas it can be shown to be of illegitimate birth; that it was the spontaneous and voluntary action of a reunited people, whereas it was cradled under martial law.

- Slaughter House Cases, 16 Wallace, 36.
- Bradwell vs. State, 16 Wallace, 130.
- Burtemeyer vs. Iowa, 18 Wallace, 129.
- Minor vs. Happersett, 21 Wallace, 62.
- Walker vs. Sauvinet, 92 United States, 90.
- United States vs. Reese, 92 United States, 214.
- Kennard vs. La., 92 United States, 480.
- United States vs. Cruikshank, 92 United States, 542.
- Munn vs. Illinois, 94 United States, 113.
- Strauder vs. W. Va., 100 United States, 303.
- Virginia vs. Rives, 100 United States, 313.
- Ex parte Virginia, 100 United States, 339.
- Missouri vs. Lewis, 101 United States, 22.
- Neal vs. Delaware, 103 United States, 370.
- Civil Rights Cases, 190 United States, 3.
- La. vs. N. Orleans, 109 United States, 285.
- Hurtado vs. Cal., 110 United States, 516.
- Ex parte Yarbrough, 110 United States, 651.
- Hagar vs. Rec. Dist., 111 United States, 701.
- Elk vs. Wilkins, 112 United States, 94.
- Head vs. Mfg. Co., 113 United States, 9.
- Barbier vs. Connolly, 113 United States, 27.
- Prov. Inst. vs. Jersey City, 113 United States, 506.
- Soon Hing vs. Crowley, 113 United States, 703.
- Wurts vs. Hoagland, 114 United States, 606.
- Ky. R. R. Cases, 115 United States 321.
- R. R. Co. vs. Humes, 115 United States, 512.
- Campbell vs. Holt, 115 United States 620.
- Presser vs. Illinois, 116 United States, 252.
- Stone vs. Trust Co., 116 United States, 307.
- Arrowsmith vs. Harmoning, 118 United States, 194.
- Yick Wo vs. Hopkins, 118 United States, 356.
- County vs. R. R. Co., 118 United States, 394.
- Fire Assn. vs. N. Y., 119 United States, 110.
- Schmidt vs. Cobb, 119 United States, 286.
- Baldwin vs. Frank, 119 United States, 678.
- Hayes vs. Missouri, 120 United States, 64.

- Church vs. Kelsey, 121 United States, 282.
 Bank vs. Boston, 125 United States, 60.
 Mining Co. vs. Pa., 125 United States, 181.
 Spencer vs. Merchant, 125 United States, 345.
 Dow vs. Beidelman, 125 United States, 680.
 Ro Bards vs. Lamb, 127 United States, 58.
 R. R. Co. vs. Mackey, 127 United States, 205.
 R. R. Co. vs. Herrick, 127 United States, 210.
 Powell vs. Pa., 127 United States, 678.
 Kidd vs. Pearson, 128 United States, 1.
 R. R. vs. Alabama, 128 United States, 96.
 Walston vs. Nevin, 128 United States, 578.
 R. R. Co. vs. Beckwith, 129 United States, 26.
 Dent vs. W. Va., 129 United States, 114.
 Huling vs. Imp. Co., 130 United States, 559.
 Freeland vs. Williams, 131 United States, 405.
 Pennie vs. Reis, 132 United States, 464.
 Sugg vs. Thornton, 132 United States, 524.
 Davis vs. Beason, 133 United States, 333.
 R. R. Co. vs. Miss., 133 United States, 587.
 Eilenbecker vs. Plymouth, 134 United States, 31.
 R. R. Co. vs. Pa., 134 United States, 232.
 R. R. Co. vs. Minn., 134 United States, 418.
 Ins. Co. vs. N. Y., 134 United States, 594.
 R. R. Co. vs. Woodson, 134 United States, 614.
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 McCaughey vs. Lyall, 227 United States, 558.
 Graham vs. W. Va., 224 United States, 616.
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 Bank vs. Dolley, 228 United States, 1.
 R. R. Co. vs. Hackett, 228 United States, 559.
 Dock Co. vs. Fraley, 228 United States, 680.
 Theatre Co. vs. Chicago, 228 United States, 61.

Upon inspection of these 359 cases, it will appear that this Court has heretofore assumed the validity of the Amendment;

as the Government's brief in the case at bar, also assumes it.

The object of the present brief is to challenge directly the validity of the Amendment; to deny that it was ever legally adopted; to deny that it is a part of the Constitution.

The subject being large, comprehensive, and intricate, may for convenience be divided into sixteen branches as follows:

1. Is Article 5 of the original Constitution the sole guide by which Amendments are to be added thereto?
2. What requirements are prescribed by Article 5 as essential to a valid Amendment?
3. Were the two Houses of the 39th Congress organized according to the Constitution?
4. What meaning shall be attributed to the words "two-thirds" used in Article 5 as the affirmative vote required in the two Houses of Congress to propose an Amendment? Does it mean two-thirds of a quorum? or of the complete body? Or of those present?
5. May a State change its expressed attitude towards a proposed Amendment?
6. If so, up to what period of time is such change permissible?
7. May a State change from an expressed affirmative to a negative, as well as from an expressed negative to an affirmative?
8. Can the action of the State be influenced by Congress in denying it representation there, unless it ratifies a proposed Amendment?
9. Were the bodies acting as Legislatures in the eleven Southern States constitutionally organized?
10. Is a ratification procured under duress and coercion binding upon a State and upon the United States, as the voluntary ratification of a State would be?
11. Is the ratification by such a Legislature constitutionally effective?
12. Was there such acquiescence by the people and all branches of the Government in the Fourteenth Amendment as to preclude this Court from reviewing this subject to ascertain if Article 5 was complied with?
13. Is the question of the validity of a Constitutional Amendment legal or political in character?
14. Were the slaves freed by the Thirteenth Amendment

competent to act, as legislative bodies, on the adoption of the Fourteenth Amendment?

15. Does any Statute of Limitation preclude the Court from reviewing the procedure culminating in the alleged Fourteenth Amendment?

16. May several separable propositions be legally united in one Constitutional Amendment?

Taking these branches up in regular order, no one will dispute:

1. That Article 5 of the original Constitution is the sole guide and authority for amending the Constitution; a proposed Amendment squaring therewith becomes, by that fact alone, a part of the Constitution; and conversely, a proposed Amendment not complying therewith is by that fact alone, not a part of the Constitution.

Article 5 reads as follows:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State without its consent shall be deprived of its equal suffrage in the Senate."

2. The essential requisites to a valid Amendment as prescribed by Article 5 are:

(a) Two-thirds of both Houses shall deem it necessary to amend the Constitution;

(b) Such proposed Amendment by the two Houses shall be ratified by the legislatures of three-fourths of the several States.

3. Were the two Houses of Congress in the first session of the 39th Congress organized according to the Constitution,

so that they were able to propose amendments to the Constitution in the manner prescribed by Article 5? To answer this question requires a review of the validity of the legislation enacted during the Reconstruction period. Five Acts of Congress were passed respectively, March 2, 1867 (14 Stats. at L., P. 428); March 23, 1867 (15 Stats. at L., P. 2); July 18, 1867 (15 Stats. at L., P. 14); March 11, 1868 (15 Stats. at L., P. 41), and June 25, 1868 (15 Stats. at L., P. 73). As further reflecting the sentiment of Congress during that period, the following Concurrent Resolution, introduced by Mr. Stevens, from the Committee on Reconstruction, was passed by the House of Representatives February 20, 1866 (House Journal, First Session, 39th Congress, Pages 10 to 13) and by the Senate, March 2, 1866 (Senate Journal, First Session, 39th Congress, Pages 198 and 199):

"Resolved by the House of Representatives (the Senate concurring), That, in order to close agitation upon a question which seems likely to disturb the action of the Government, as well as to quiet the uncertainty which is agitating the minds of the people of the eleven States which have been declared to be in insurrection, no Senator or Representative shall be admitted into either branch of Congress from any of said States until Congress shall have declared said State entitled to such representation."

In consequence of this legislation, eighteen seats were vacant in the Senate in a body of seventy-four members; and forty-two seats were vacant in the House of Representatives in a body of two hundred and forty members. It was under these conditions that House Joint Resolution 127 (which culminated in the alleged Fourteenth Amendment) was introduced into the House April 30, 1866, and passed May 10, 1866 (House Journal, First Session 39th Congress, Page 686), by a vote of yeas 128, nays 37, not voting 18. It also passed the Senate June 8, 1866, by a vote of yeas 33, nays 11 (Senate Journal, First Session, 39th Congress, Page 504). While undoubtedly the period was one of great stress, when unparalleled power was constantly being exercised by the Congress, yet, since Article 5 makes no distinction between Amendments originating in war and in peace, placing all on exactly equal footing, it is competent for the Court to inquire, at the threshold of this review, whether Congress had the power under the Constitution, to dismember and mutilate its own Houses to the

extent of excluding eighteen members of the upper House and forty-two of the lower House, and whether the two Houses were so organized that they could propose Amendments as required by Article 5. Also whether the five Acts of Congress, two of which required ratification of the Fourteenth Amendment by the Southern States as a condition precedent to the restoration of their representation in Congress, were beyond the power of Congress. Heretofore this Court has passed on the validity of certain Acts of Congress as follows:

- Scott vs. Sandford, 19 Howard, 393.
- Gordon vs. United States, 2 Wallace, 561.
- Ex parte Garland, 4 Wallace, 105.
- United States vs. DeWitte, 9 Wallace, 41.
- Justices vs. Murray, 9 Wallace, 273.
- Collector vs. Day, 11 Wallace, 113.
- United States vs. Klein, 13 Wallace, 128.
- United States vs. R. R. Co., 17 Wallace, 332.
- United States vs. Reese, 2 Otto, 214.
- United States vs. Steffens, 10 Otto, 82.
- United States vs. Fox, 95 United States, 670.
- Trade-Marks Cases, 101 United States, 705.
- United States vs. Harris, 106 United States, 629.
- Civil Rights Cases, 109 United States, 3.
- Boyd vs. United States, 116 United States, 616.
- Callan vs. Wilson, 127 United States, 540.
- Pollock vs. Trust Co., 157 United States, 429.
- Pollock vs. Trust Co., 158 United States, 601.

If the five Acts of Congress known as the Reconstruction Acts, and the concurrent resolution above quoted, be tested by the principles announced by this Court in the foregoing decisions, can they stand? Were they in excess of the twenty-five powers conferred upon Congress by Section 8 of Article 1 of the Constitution, especially when viewed with eleven limitations placed upon the exercise of these powers by Section 9, Article 1, thereof? If so, can the two Houses so organized be regarded as the equivalents of the two Houses mentioned in Article 5? The composition of the House of Representatives is defined in Section 2 of Article 1 of the Constitution. The composition of the Senate is defined in Section 3 of Article 1. Is it not fair to assume that when the framers of the Constitution, in Article 5, referred to the two Houses of Congress,

they meant bodies organized in conformity to Sections 2 and 3 of Article 1? Was the first session of the 39th Congress composed of bodies so organized? If not, were they competent to propose an Amendment to the Federal Constitution consonant with Article 5? If not, is the alleged Fourteenth Amendment, so conceived, valid and a part of the Constitution?

By reference to the proclamation of Secretary of State Seward, dated December 18, 1865 (Appendix, Page 39), announcing the adoption of the 13th Amendment, it will be observed that of the 27 States out of 36, the following Southern States participated in its ratification: Virginia, Louisiana, Tennessee, Arkansas, South Carolina, Alabama, North Carolina, and Georgia. If these 8 Southern States were essential to make an effective ratification of that Amendment, why was their representation in Congress not equally essential to its proposal? The proposal and ratification are each essential to a valid adoption under Article 5. The executive branch of the Government, by the proclamation, recognized these States as in the Union for the purpose of participating in the Ratification. This Court, as the exponent of the judicial branch of the Government, had repeatedly held every Southern State never to have been out of the Union, originating the phrase "an indissoluble union of indestructible States." A State cannot be both in and out of the Union at the same time. Yet the legislative branch of the Government declined to permit the Southern States representation on its floors, or participation in its legislation. This branch, by sheer brute power, had forced these Amendments through the Houses of Congress without permitting the South to be heard thereon, and called the Army to its aid to force an involuntary ratification. The Amendments have been forced down the throat of the Nation by a ramrod, and have since been an indigestible burden upon its stomach, from which the country needs relief by an emetic or a pump. The only power now available to the Nation to afford appropriate relief is this Court. The question now is here for determination, in an appropriate opportunity, whether the desired relief shall be accorded, which question only the Court can answer.

By reference to a plebiscite in Ohio (Appendix, Page 65), it was ascertained that the people were against Negro suffrage. The popular will was violated in the alleged adoption of these Amendments even in the Northern States of Ohio, New Jersey, Oregon, Maryland, Delaware and Kentucky.

The Southern States that rejected the 14th Amendment were within their rights, as the 6 Northern States that did the same thing were. If the 6 Northern States (New Jersey, Ohio, Oregon, Delaware, Kentucky and Maryland) that rejected the Amendment had been deprived of their representation in Congress, solely because of the rejection, and subjected to martial law, a parallel would exist for the operation of the Reconstruction Acts in the South. The thing that was permitted in a Northern State was denied in a Southern State. Is this the boasted equality of States, known as the "Republican Form of Government" guaranteed to each State by the Constitution? These belated questions it is high time to answer. This Court holds the key to the situation. The Nation, on bended knee, asks the Court to determine once for all the question whether the 14th and 15th Amendments were legally adopted. In the language of the Hymnal it says to the Court: "Other refuge have I none, hangs my helpless soul on thee."

4. The language of Article 5 with respect to proposing Amendments is:

"The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution."

The words "two-thirds" are found in other portions of the Constitution and in the Amendments thereto as follows:

(a) In Clause 2 of Section 5 of Article 1: "Each House may * * * with the concurrence of two-thirds, expel a member";

(b) In Clause 2 of Section 7 of Article 1: "If, after such reconsideration, two-thirds of that House shall agree to pass the Bill," etc.;

(c) In Clause 3 of Section 7 of Article 1: "or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives";

(d) In the Twelfth Amendment: "a quorum for this purpose shall consist of a member or members from two-thirds of the States";

(e) In Section 3 of the Fourteenth Amendment: "But Congress may by a vote of two-thirds of each House remove such disability."

Ought the same words in the same Constitution have the same meaning throughout? Do the words in Article 5 mean

two-thirds of those present; or two-thirds of a quorum; or two-thirds of the complete bodies organized in accordance with Sections 2 and 3 of Article 1? In the same Article 5 we find the words:

“when ratified by the legislatures of three-fourths of the several States.”

It would be as logical to interpret the framers of the Constitution as meaning that “three-fourths of the legislatures of the several States” acting on a proposed Amendment is a gratification of this explicit language when it evidently means three-fourths of the legislatures of the total number of States, as to interpret that “two-thirds of both Houses” meant two-thirds of the quorum present in those Houses or two-thirds of those present. The words “two-thirds” in the 12th Amendment, can only mean “of the total number of States.” But further, if the Court holds that the two Houses of the 39th Congress were not constitutionally organized and that the Reconstruction legislation, resulting in the exclusion of representation from the Southern States was beyond the power of Congress, was there even a quorum present, in the First Session of the 39th Congress acting on House Joint Resolution 127? Was the Amendment ever legally proposed, agreeably to the terms of Article 5? *U. S. vs. Ballin*, 144 U. S. 1; *State vs. Gould*, 31 Minn., 189.

Furthermore, the Constitution provides (Art. 5) that no State, without its consent, shall be deprived of its equal suffrage in the Senate. Yet the effect of the Reconstruction Acts was to accomplish that very result with respect to the Southern States. In addition thereto, in the same (First) Session of the 39th Congress, the State of New Jersey was, without its consent, deprived of one half of its representation in the Senate by the exclusion of John P. Stockton therefrom (*Senate Journal*, First Session, 39th Congress, Pp. 5, 66, 119, 264, 269, 270, 277, 278, 279, 289).

A legislative review of the words, “two-thirds of both Houses” is found in Vol. 48, No. 211, *Cong. Rec.*, Pp. 11,908, 11,909, 11,910; also in Vol. 49, Page 1,175.

A quorum is defined in Clause 1, Section 5, Article 1 of the Constitution, also in the Twelfth Amendment.

5. It is evident that the legislature of a State may take three attitudes toward a proposed Amendment to the Federal Constitution: It may take affirmative action, leading to Rati-

fication; or negative action leading to Rejection; or non-action, leading to the preservation of Neutrality. Article 5 apparently contemplates that when three-fourths of the legislatures of the total number of States in the Union affirmatively act on a proposed Amendment, then *eo instante* that the legislature of the last State of the three-fourths acts; it becomes *ipso facto* valid and a part of the Constitution. Article 5 is silent about States changing their attitude toward a proposed Amendment; also, whether, if such change is permissible, it is competent and legal for a State to change its attitude from a negative to an affirmative only; or whether, it is also competent to change conversely. Also, whether, if a change is permissible, up to what period the door still stands open to record changed convictions. Legislatures in New Jersey, Ohio and Oregon were of opinion a Ratification could be withdrawn. The answer to these questions is crucial in its application to the alleged 14th Amendment. (See table, Appendix, Page 41).

Alabama rejected the Amendment Feb. 22, 1866 (Acts of Ala., 65-66, P. 607); and ratified it July 13, 1868 (Ala., Acts 1868, P. 138).

Arkansas rejected the Amendment Jan., , 1867 (Acts Ark., 66-67, P. 550); and ratified it April 6, 1868 (Acts of Ark. 1868, P. 345).

California did not act at all on the Amendment.

Connecticut ratified the Amendment June 30, 1866 (L. Conn., Pr. 66, P. 33).

Delaware rejected the Amendment Feb. 8, 1867 (L. Del. 67, P. 303).

Florida rejected the Amendment Dec. 9, 1866 (L. Fla. 66, P. 86); and ratified it July 31, 1868 (L. Fla. 68, P. 175).

Georgia rejected the Amendment Nov. 13, 1866 (L. Ga. 66, P. 216); and ratified it July 31, 1868 (L. Ga. 70, P. 491).

Illinois ratified the Amendment Jan. 15, 1867 (2 Doc. H. C. U. S., P. 690).

Indiana ratified the Amendment Jan. 29, 1867 (L. Ind. 67, P. 235).

Iowa ratified the Amendment April 3, 1868 (L. Iowa 68, P. 293).

Kansas ratified the Amendment Jan. 18, 1867 (L. Kans. 67, P. 4).

Kentucky rejected the Amendment Jan. 10, 1867 (1 Ky. Acts. 67, P. 119).

Louisiana rejected the Amendment Feb. 9, 1867 (Acts, La.

67, P. 9); and ratified it July 9, 1868 (Acts La. 68, P. 3).

Maine ratified the Amendment Jan. 19, 1867 (L. Me. 67, P. 37).

Maryland rejected the Amendment Mar. 23, 1867 (L. Md. 67, P. 879).

Massachusetts ratified the Amendment Mar. 20, 1867 (L. Mass. 67, P. 787).

Michigan ratified the Amendment Feb. 15, 1867 (1 Mich. Acts. 67, P. 312).

Minnesota ratified the Amendment Feb. 1. 1867 (2 Doc. H. C. U. S., P. 717).

Mississippi rejected the Amendment Jan. 31, 1867 (L. Miss. 66-67, P. 734); and ratified it Jan. 15, 1870 (L. Miss. 70, P. 631).

Missouri ratified the Amendment Jan. 26, 1867 (Mo. L. 67, P. 196).

Nebraska ratified the Amendment June 17, 1867 (L. Neb. 67, P. 158).

Nevada ratified the Amendment Jan. 22, 1867 (Nev. Stats. 67, P. 136).

New Hampshire ratified the Amendment July 7, 1866 (L. N. H. 66. P. 3290).

New Jersey ratified the Amendment September 11, 1866 (L. N. J. 66, P. 1113); and rejected it Mar. 27, 1868 (L. N. J. 68, P. 1225).

New York ratified the Amendment Jan. 10, 1867 (L. N. Y. 67, P. 2487).

North Carolina rejected the Amendment Dec. 14, 1866 (N. C. L. P. and Pr., 66-67, P. 213); and ratified it July 4, 1868 (L. N. C. 68, P. 89).

Ohio ratified the Amendment Jan. 11, 1867 (L. Ohio 67 P. 320); and rejected it Jan. 15, 1868 (L. Ohio 68, P. 280).

Oregon ratified the Amendment Sept. 19, 1866 (L. Ore. 66, P. 73); and rejected it Oct. 16, 1868 (L. Ore. 68, P. 111).

Pennsylvania ratified the Amendment Feb. 13, 1867 (Pa. L. 67, P. 1334).

Rhode Island ratified the Amendment Feb. 7, 1867 (R. I. A. & R. 67, P. 161).

South Carolina rejected the Amendment Dec. 20, 1866 (S. C. R. & R. 66, P. 220); and ratified it July 9, 1868 (S. C. C. & L. 68, P. 154).

Tennessee ratified the Amendment July 19, 1866 (Tenn.

Acts 66, P. 23). Inspection of the journal shows that irregularities existed in the Legislature.

Texas rejected the Amendment Nov. 1, 1866 (Tex. L. 66, P. 266).

Vermont ratified the Amendment Nov. 9, 1866 (L. Vt. 66, P. 81).

Virginia rejected the Amendment Jan. 19, 1867 (Va. Acts. Ass. 66-67, P. 508); and ratified it Oct. 8, 1869 (Va. Acts. Ass. 69-70, P. 3).

West Virginia ratified the Amendment Jan. 16, 1867 (W. Va. Ass. 67, P. 173).

Wisconsin ratified the Amendment Feb. 13, 1867 (Wis. L. Gen. 67, P. 189).

It thus appears that thirty-seven States were in the Union (see two proclamations of the Secretary of State, dated respectively July 20, 1868, recorded P. 783, Doc. Hist. Const. U. S. Vol. 2. Bureau of Rolls and Library; and July 28, 1868, P. 788, same book; Also found in this Appendix, Pages 55 and 58).

Of this number, nineteen ratified the Amendment absolutely. Tennessee's ratification is questionable. Four States rejected the Amendment. Twelve States acted both ways on the Amendment; three changing from an affirmative to a negative; nine changing from a negative to an affirmative. The action in these nine States was inspired by the Reconstruction Acts. One State did not act on the Amendment at all.

6. If a State can change its attitude towards a proposed Amendment, up to what point in the progress of its incubation is such change permissible? As it does not become effective until the last State ratifies it, to make up a three-fourths vote, and Art. 5 is silent on the subject, is it not reasonable for this Court to establish the doctrine that a State may change its action up to the time the Amendment has become effective? In commercial law, various examples of this doctrine are attested by crystallized usage and hoary precedent. Thus the law of stoppage *in transitu* is recognized from time immemorial as authorizing a vendor to intercept or recall a consignment to a vendee, up to the moment of actual delivery. A seller of realty or personalty, on periodic instalments, may stipulate that title shall remain in vendor until payment of last instalment, and that possession may be recovered on breach of conditions at any time before final consummation of contract.

7. If a State can change its attitude towards a proposed

Amendment until the time it has become effective, is it just to grant this right to a State that changes its action from a negative to an affirmative, as North Carolina and South Carolina, and deny this right to a State that changes its action from an affirmative to a negative, as Ohio, New Jersey and Oregon? Secretary Seward, in his proclamation of July 20, 1868, expressed his doubts on this subject, but stated that as an executive officer, he lacked power to solve them. (See Appendix, Page 55).

8. Nine of the States that changed their attitude towards the Amendment, did so because, under the Reconstruction Acts and the Concurrent Resolution (quoted in Division 3 of this brief), the restoration of their representation in Congress and the discontinuance of Martial Law, depended on their ratification of the Fourteenth Amendment, which each had previously rejected. Does this create such coercion and duress as to avoid the ratification? The word "ratify" implies "to make or create or sanction by reasoning". If a Will or Deed is brought before this Court for enforcement where the depositor or grantor was imprisoned at the time of execution, or had a dangerous weapon brought in proximity to his person as an inducement to procure his assent thereto, would this Court enforce it?

9. Upon analysis of the Reconstruction Acts, it will be seen that the qualified voters of the Southern States were thereby disfranchised from voting at National and even State elections; and that the legislatures that came into existence in consequence of these acts could not be regarded as such republican form of Government as was guaranteed by Sec. 4 of Art. 4 of the Constitution (*Luther vs. Borden*, 7 How 1; *Tex. vs. White*, 7 Wall. 700).

10. To permit a ratification procured by duress, threats, menaces, and coercion, to have the same legal effect as a ratification expressive of the free, voluntary, untrammelled will of a State, would be to place a premium upon wrong, and mock justice. It is freely stated that the insurrectionary condition at this time of the Southern States was caused by the attempt to force these States to ratify this Amendment, to make up the three-fourths otherwise unattainable. Tennessee, North Carolina, South Carolina, Louisiana, Georgia, Alabama, Florida, and Arkansas were restored to representation in Congress, after each had ratified the 14th Amendment, by special Acts of Congress. (14 Stats. at L. 364; 15 Stats. at Law, 72, 73.)

11. Were the Legislature formed by the Southern States under the Reconstruction Acts, the kind of Legislatures prescribed by Art. 5 as qualified to express the assent of the States towards a proposed Amendment? By way of contrast it may be noted that there was a vast difference in the quality of the Legislatures that acted on the 13th Amendment and those that acted on the 14th.

On July 21, 1868, Mr. Sherman submitted a resolution which was considered by unanimous consent and agreed to as follows. (See Appendix, Page 57.)

This resolution fails to note that Oregon's and Tennessee's ratifications were claimed to be irregular; that New Jersey and Ohio had previously rescinded their respective ratifications; also that Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana had severally rejected the same Amendment previously to their ratifications; also that the authenticity and authority of the latter Legislatures were seriously questioned and that their actions was founded on the Reconstruction Acts. Secretary Seward, in his proclamation of July 20, 1868, questioned the integrity of the Legislatures in the Southern States that ratified the Amendment after rejection by previous legislatures. He correctly stated that he was not invested with power to decide such matters.

Senator Sherman's resolution of July 21, 1868, did not alter the situation either; since the questions presented for determination were neither executive nor legislative, but purely judicial in character

12. Acquiescence in a law or condition, has not heretofore deterred this Court from examining into the validity of it; and numerous laws have been annulled by this Court that had been acquiesced in for long periods of time. In one case (*Scott vs. Sandford*, 19 Howard, 393), thirty-seven years elapsed between the enactment of the law and its annulment; and all branches of the Government and the public had learned to acquiesce in it intermediately.

13. Not only this Court but the State Courts generally, have expressly or impliedly regarded it as a legal question whether an Amendment has been added to the Constitution conformably therewith; or whether a proposed law conforms to the Constitution. Examples of this will be found in the following cases:

Hollingsworth vs. Virginia,
Scott vs. Sandford,

3 Dallas, 381.
19 Howard, 393.

Gordon vs. United States,	2	Wallace,	561.
Ex parte Milligan,	4	Wallace,	2.
Ex parte Garland,	4	Wallace,	105.
Cummings vs. Missouri,	4	Wallace,	277.
Mills vs. Johnson,	4	Wallace,	475.
U. S. vs. Dewitt,	9	Wallace,	41.
Justices vs. Murray,	9	Wallace,	273.
Collector vs. Day,	11	Wallace,	113.
U. S. vs. Klein,	13	Wallace,	128.
U. S. vs. R. R. Co.	17	Wallace,	332.
U. S. vs. Reese,	2	Otto	214.
U. S. vs. Steffins,	10	Otto	82.
U. S. vs. Fox,	95	U.S.	670.
Trade Mark Cases,	101	U.S.	705.
U. S. vs. Harris,	106	U.S.	629.
Civil Rights Cases,	109	U.S.	3.
Poindexter vs. Greenhow,	114	U.S.	270.
Brown vs. Houston,	114	U.S.	622.
Boyd vs. U.S.	116	U.S.	616.
Gordon vs. U. S.	117	U.S.	705.
Callan vs. Wilson,	127	U.S.	540.
U. S. vs. Eallin,	144	U.S.	1.
Wood vs Fitzgerald,	3	Oregon	568.
Collier vs. Frierson,	24	Ala.	100.
Koehler vs. Hill,	60	Iowa	543.
In re Gunn,	50	Kansas,	155.
Westinghausen vs. People,	44	Mich.	265.
Miss. vs. Powell,	77	Miss.	543.
Prince vs. Skillin,	71	Mo.	367.
N. J. vs. Wurts,	45	L.R.A.	251.
State vs. Pritchard	36	N.J.L.	101.
State vs. Rogers,	56	N.J.L.	480.
N. C. vs. McIver,	72	N. C.	76.
Hudd vs. Timme,	54	Wisc.	318.
Livermore vs. Wait,	102	Cal.	113.
State vs. Swift,	69	Ind.,	505.
Miller vs. Johnson,	15	L.R.A.,	524.
Secombe vs. Kittelson,	29	Minn.,	555.
University vs. McIver,	72	N.C.,	76.
Smith vs. McClain,	146	Ind.,	77.
Ellingham vs. Dye,	99	N.E.,	1.

14. By inspection and analysis it will be observed that the five

Acts of Congress known as the Reconstruction Acts (specified under Division 3 of this brief) operated to procure six principal results, besides numerous secondary results:

(a) They declared insurrection to exist in the eleven Southern States;

(b) They deprived these States of representation in both Houses of Congress;

(c) They suspended the civil functions and Governments of those States;

(d) They transformed those States into five military districts;

(e) They disfranchised citizens of those States theretofore competent to vote at State and National elections;

(f) They enfranchised the former slaves, liberated by the 13th Amendment, and transformed them into full citizens with power to act on the proposed 14th Amendment, and other legislation in State legislatures;

Can the exercise of such powers by Congress be reconciled with the decisions of this Court annulling other legislation of Congress (specified in Division 13 of this brief)? It is not absurd to claim that the freedmen were competent to sit in Legislatures and vote on the question of whether they should be invested with complete powers of citizenship as provided by the alleged 14th Amendment?

15. From numerous decisions of this and other Federal Courts, besides the State Courts, the only deduction permissible is that no Statute of Limitations restrains the Court from reviewing legislative acts. Thus the Act of 1820, known as the Missouri Compromise Act, came before this Court for review in 1857, and was annulled (*Scott vs. Sandford*, 19 Howard, 393). The Trade Mark Cases (101 U. S. 705) illustrate the same principle; and no case found, conflicts with this doctrine.

16. Section 1 of the 14th Amendment contains four separate propositions:

(a) Defines citizenship in the United States.

(b) Inhibits States from making or enforcing laws abridging the privileges or immunities of citizens of the United States.

(c) Inhibits States from depriving any person of life, liberty, or property without due process of law (already engrafted in the Constitution by Amendment 5).

(d) Inhibits States from denying any person within their jurisdiction the equal protection of the laws.

Section 2 contains two separate propositions:

(a) Defines qualifications of representatives (already provided for without substantial difference in Clause 3 of Section 2 of Article I of the original Constitution.)

(b) Provides reduced representation in the House of Representatives when the right to vote is denied to citizens of the United States.

Section 3 contains two separate provisions:

(a) Prescribes ineligibility of persons to hold certain offices who engaged in insurrection.

(b) Prescribes for removal of disability by Congress.

Section 4 contains two separate propositions:

(a) Validity of public debt of United States shall not be questioned.

(b) Debts etc. incurred in aid of insurrection etc. are held illegal and void.

Section 5 empowers Congress to enforce the Amendment by appropriate legislation.

It thus appears that ten separable and distinct provisions were embraced in this one Amendment, two of which were already in the Constitution and were being duplicated. While Art. 5 is silent as to how many propositions may be embraced in one Amendment, a sound interpretation and construction of the Article would limit each Amendment to one proposition; since otherwise the Legislatures might approve some and disapprove other of the contained propositions in a tentative Amendment.

Amendment 14 to the Constitution reads as follows: (See Appendix, Page 68).

The foregoing analysis has applied only to the 14th Amendment, and a similar dissecting process will follow on the 15th Amendment.

On January 15, 1869, Senate Joint Resolution 8 (3d Session, 40th Congress) was reported to the Senate with amendment (Sen. J., p. 105); on January 23, 1869 it was considered and action thereon postponed (Sen. J., p. 137); on January 29, 1869, it was further considered (Sen. J., p. 158, 163, 164); on February 17, 1869, it was further considered (Sen. J., 287-293) and passed by a vote of yeas 35 and nays 11 (Sen. J., p. 293); on February 18, 1869, the concurrence of the House was asked (H. J., p. 374); on February 20, 1869, it was considered and amended by the House (H. J. 405-410) and passed as amend-

ed, by a vote of yeas 140, nays 37, not voting 46 (H. J., p. 411); on February 22, 1869, the House requested concurrence by Senate in House amendments (Sen. J. p. 318) on January 23, 1869, the House amendments were considered and disagreed to (Sen. J. p. 323-324) and conferees were appointed the same day (H. J. p. 430-431); the appointment of House conferees was announced on the same day (Sen. J. p. 329); on February 25, 1869 the House agreed to the conference report by a vote of yeas 144, nays 44, not voting 35 (Sen. J. p. 347; H. J. p. 449-450); on the same day the Senate conferees' report was submitted (Sen. J. 350-351); on February 26, 1869, the Senate agreed to the conference report, yeas, 39, nays 13 (Sen. J. p. 361), and the Senate concurrence was announced to the House the same day (H. J. p. 466); on January 27, 1869, the Speaker signed the resolution (H. J. p. 469) and it was submitted to the President on the same day. The whole number of votes in the Senate of the 40th Congress was 51 (Sen. J. 1st Sess. 67, p. 3-5); the whole number of votes in the House of the 40th Congress was 157 (H. R. 1st Sess. 40th Cong. p. 3-7) sworn in on March 4, 1867.

The criticism on the 39th Congress, contained in Division 3 (p. 17 to p. 21 of this brief) are substantially applicable to the 40th Congress, and the question is again asked: Was the 40th Congress organized in such manner that it could propose to the States the proposed Amendment 15 agreeably to Article 5? The action of the States is conveniently shown on a table (Appendix, p. 62) wherefrom it appears that

Alabama ratified the Amendment Nov. 24, 1869 (A. Acts 69-70, p. 455).

Arkansas ratified the Amendment Mar. 30, 1869 (A. Acts 68-69, p. 208).

California rejected the Amendment January 28, 1870 (Cal. Stats., 69-70, p. 208).

Connecticut ratified the Amendment May 19, 1869 (L. Conn. Pr. 69, p. 3).

Delaware rejected the Amendment Mar. 18, 1869 (3 Del. L. 69, p. 653).

Florida ratified the Amendment June 15, 1869 (L. Fla. 69, p. 53).

Georgia ratified the Amendment Feb. 2, 1870 (L. Ga. 70, p. 42).

Illinois ratified the Amendment Mar. 15, 1869 (Ill. L. Pub. 69, p. 417).

Indiana ratified the Amendment May 14, 1869 (L. Ind. 69, p. 128).

Inspection of the journals of the Legislature casts doubts as to the validity of the ratification.

Iowa ratified the Amendment Feb. 3, 1870 (L. Ia. 70, p. 242).

Kansas ratified the Amendment Jan. 19, 1870 (L. Kans. 70, p. 266).

Inspection of the journals of the Legislature casts doubts as to the validity of the ratification.

- Kentucky rejected the Amendment Mar. 13, 1869 (1 Ky. Acts 69, p. 119).
- Louisiana ratified the Amendment Mar. 5, 1869 (A. La. 68-70, p. 56).
- Maine ratified the Amendment Mar. 12, 1869 (L. Me. 69, p. 42).
- Maryland rejected the Amendment Apr. 4, 1870 (Md. L. 70, p. 931).
- Massachusetts rejected the Amendment Mar. 12, 1869 (L. Mass. 69, p. 285).
- Michigan ratified the Amendment Mar. 8, 1869 (1 Mich. A. 69, p. 391).
- Minnesota ratified the Amendment Jan. 19, 1870 (Minn. G. L. 70, p. 203).
- Mississippi ratified the Amendment Jan. 15, 1870 (L. Miss. 70, p. 633).
- Missouri ratified the Amendment Jan. 10, 1870 (Mo. L. 70, p. 502).
- Inspection of the journals of the legislature casts doubts as to the validity of the ratification.
- Nebraska ratified the Amendment Feb. 17, 1870 (L. Neb., 70-71, p. 49).
- Nevada ratified the Amendment Mar. 1, 1869 (Stat. Nev. 69, p. 302).
- Inspection of the journals of the legislature casts doubts as to the validity of the ratification.
- New Hampshire ratified the Amendment July 7, 1869 (N. H. L. 69, p. 307).
- New Jersey rejected the Amendment Feb. 15, 1870 (L. N. J. 70, p. 67;—Appendix, p. 63); and ratified the Amendment Feb. 21, 1871 (L. N. J. 71, p. 133—Appendix, p. 63).
- New York ratified the Amendment Apr. 14, 1869 (2 L. N. Y. 70, p. 2147, Appendix p. 64); and rejected it Jan. 5, 1870 (2 L. N. Y. 70, p. 2147, Appendix, p. 64).
- North Carolina ratified the Amendment Mar. 5, 1869 (N. C. L. 68-69, p. 709).
- Ohio rejected the Amendment May 4, 1869 (O. L. 69, p. 424, Appendix, p. 65), and ratified it Jan. 27, 1870 (O. L. 70, p. 156, Appendix, p. 66).
- Oregon rejected the Amendment Oct. 26, 1870 (Ore. L. 70, p. 190).
- Pennsylvania ratified the Amendment Mar. 26, 1869 (Pa. L. 69, p. 1284).
- Rhode Island ratified the Amendment Jan. 18, 1870 (R. I. A. & R. 70, p. 205).
- South Carolina ratified the Amendment Mar. 16, 1869 (L. S. C. 68-69, p. 288).
- Tennessee rejected the Amendment Feb. 24, 1870 (Tenn. Acts 69-70, p. 712).
- Texas ratified the Amendment Feb. 18, 1870 (2 Doc. H. C. U. S. A., p. 888).
- Vermont ratified the Amendment Oct. 21, 1869 (L. Vt. 69, p. 61).
- Virginia ratified the Amendment Oct. 8, 1869 (Va. Acts, 69-70, p. 3).
- West Virginia ratified the Amendment Mar. 3, 1869 (2 Doc. H. C. U. S. A., p. 803).
- Wisconsin ratified the Amendment Mar. 9, 1869 (Wisc. G. L. 69, p. 270).

There were then 37 States in the Union, of which 28 were required to constitute an effective ratification.

Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, Virginia—ten in number, classified in the ratifying column, were under military control and martial law, their legislatures were open to

the same objections urged against the ratifications of the 14th Amendment by some of these States. Whether these States are to be counted as part of the three-fourths necessary to constitute an effective ratification depends upon the ruling of this Court on similar objections urged in this brief against counting these States as ratifying the Amendment numbered Fourteen. If these ten States be excluded from the ratifying column, it would leave fourteen States whose ratification was beyond criticism. Indiana, Kansas, Missouri, and Nevada are to be scrutinized carefully as to whether their alleged ratifications are effectual. California, Delaware, Kentucky, Maryland, Oregon, and Tennessee rejected the Amendment. New Jersey, New York, and Ohio acted both ways on the Amendment—New York revoking a ratification, while New Jersey and Ohio revoked previous rejections.

The Court will appreciate that it is highly desirable that the doubts herein suggested should now be solved, not only to answer intelligently the questions certified in the case at bar, but also to remove legislative doubts constantly arising as to the proper interpretation to be placed upon Article 5, by which amendments are added to the Constitution. To impress upon the Court this phase of the subject, it may be noted that in the 61st Congress, 43 joint resolutions were introduced in the two Houses of that Congress aiming to amend the Constitution. In the 62d Congress, 91 joint resolutions were introduced in the two Houses of that Congress to this same end. In the 63d Congress (so far), 53 joint resolutions were introduced in the two Houses of that Congress to this same end. With the consideration of each of these Resolutions the doubts herein suggested are debated ineffectively.

Furthermore, the time is ripe to settle the status of the Negro race. If the amendments are valid, they are entitled to all the privileges and immunities that unquestioned citizens of the United States are entitled to; and the questions certified should then be answered as indicated in the Government's brief.

The failure of this Court to examine into the integrity and authenticity of these amendments is an increasing source of bloodshed, disturbance, riots, friction between races, and turmoil; moreover creating economic competitive conditions that the tariff would regulate if it occurred between citizens and foreigners. That the Negro race has not been slow to avail itself of the failure of this Court to examine into its legal

status is borne out by a publication (1912) edited by a former Assistant Register of the Treasury named Cyrus Field Adams, entitled, "The Republican Party and the Afro-American" wherein he gives official statistics to prove that 27 are employed in the White House, 26 in the State Department, 926 in the Treasury Department, 170 in the War Department, 74 in the Navy Department, 187 in the Post-Office Department, 593 in the Interior Department, 43 in the Department of Justice, 164 in the Agricultural Department, 139 in Commerce and Labor Department, 364 in Washington Navy Yard, 634 in Government Printing Office, 41 in Interstate Commerce Commission, 115 in U. S. Senate, 46 in Library of Congress, 171 in Washington, D. C., post-office, 2413 in D. C. government, 194 miscellaneous Departmental service at large: State, 16, Treasury, 1082, War, 2342, Post-Office, 3599, Interior, 31, Agriculture, 102, Commerce and Labor 64, U. S. Army officers 11, enlisted men, 4416, U. S. Navy enlisted men 1529, U. S. Navy yards and stations 2146, miscellaneous 775; aggregating 22,440 drawing annual salaries of \$12,456,760.

But the Court will say to the undersigned, its newly-found friend, we have considered and passed upon the 15th Amendment, and will point to:

United States vs. Reese et al., 92 United States, 214.
 United States vs. Cruikshank et al., 92 United States, 542.
 Neal vs. Delaware, 103 United States, 370.
 Ex parte Yarbrough, 110 United States, 651.
 McPherson vs. Blacker, 146 United States, 1.
 James vs. Bowman, 190 United States, 127.
 Hodges vs. United States, 203 United States, 1.

to which ready response is made that the Court has passed on the meaning, scope, object, interpretation, and analysis of words contained in the Amendment, but has failed, or refused, to measure the Amendment as a whole by the only available test for Constitutional Amendments—Article 5—to see if it conformed thereto.

Whether the Court of that period assumed the validity of the 14th and 15th Amendments; whether it had knowledge of inherent defects in both that made it questionable if either was legally adopted, but by political or other pressure the Court declined to investigate these doubts; whether the Court of that period lacked a friend to show these doubts to it; whether the

victorious soldiers of the Union believed they had the right to attach these Amendments to the Constitution as a trophy or conquest of war, purchased on the field of battle by pouring out fraternal blood (the survivors of which victorious hosts are now walking the streets with idle hands, casting longing glances at the above-mentioned positions filled by Africans, which would be filled by them, if Republics were grateful), and dissuaded this Court from questioning such right; whether the financial power of the Country, which has since sought shelter from investigations by the States of their origin, under the same 14th Amendment that has proved a refuge and haven to the African, deterred the Court from such examination, are all questions buried with the departed members of that Court, which no person can do more than speculate about.

(However, the fact remains that the Court has not tested either Amendment as to its validity, and the opportunity to do so is now here. These appellants may wear the stripes of convicts by the refusal of this Court to consider the authenticity of these Amendments, and transmit the disgrace thereof perpetually to their respective families; or they may wear the smiles of duty well done if their case enables the Court to perform a duty long neglected, of solving the doubts herein suggested about the Amendments, a duty the Court owes to itself, to the Nation, and to the world.

Again, the Court will say to its friend, *arguendo*, we have in 359 decisions tacitly affirmed the 14th Amendment, and in at least seven cases affirmed the validity of the 15th Amendment, and by the rules of vested property rights and the doctrine of *state decisis* we could not now examine into the validity of the 14th and 15th Amendments, the effect of which analysis might be to render all these decisions nugatory and ineffectual.

Similar considerations were ineffectually urged upon the Court in the case of *Pollock vs. Farmers, L. & T. Co.*, 157 U. S., 429, 158 U. S., 601, when it was sought to cause adherence by the Court to certain principles announced in *Springer vs. U. S.*, 102, U. S., 586; but the right doctrine was then established that it was as commendable, if not more so, in a Court of Justice to confess and correct an error as it was in the case of an individual. It sometimes happens that Justice is stabbed in her own temple, by her own priests, with the very weapons provided for her defense, and this is notably illustrated in the case of the 14th and 15th Amendments. The error of not examining these Amendments as to validity just after promulga-

tion, when the opportunity to do so was presented in the Slaughter House Cases (16 Wallace, p. 35), as to the one, and in the U. S. vs. Reese (92, U. S. p. 214), as to the other, is now bearing legitimate fruit. It has placed this Court in an anomalous position, not comporting with the dignity and authoritativeness its decisions are entitled to, and receive ordinarily.

However, the present Court ought not to be held up to censure and obloquy for the errors of omission of a former Court from which it has received this legacy of error. But the present Court, now being enlightened as to the truth about these Amendments, ought not to forego the judicial dissection both need.

When the traveler from Jerusalem to Jericho fell among thieves, which stripped him of his raiment and departed, leaving him half dead, the priest and levite viewed the spectacle and passed by on the other side; but the Samaritan placed the prostrate human form on his beast of burden, carried him to an inn, paid charges for his recovery, and aided to restore the victim of cupidity to his normal position of usefulness in life (Luke 10:30). So this Court is now asked to take the mangled form of bleeding Justice, lying in the portal of her own temple and restore her to the position where she can have not only self-respect, but the respect of the world at large.

Again the Court will say to its friend, for forty-five years we have treated these Amendments as genuine and enforced them; do you now desire us to ascertain if they were legally born? Such considerations did not deter this Court from annulling the Missouri Compromise Act of 1820 after an intermediate lapse of 37 years (Scott vs. Sandford, 19 Howard, 393); or from holding void the Trade Mark Act, which had been respected as genuine for many prior years (Trade Mark Cases, 101 U. S., 705).

The Court is now at a crossing where it must either follow the great Tawney in his remarkable decision (19 Howard, 393), where he courageously proclaimed that "a person of African blood and descent is inherently incapable of being a citizen of the United States," whose prophetic words have been verified in the Nation's experience with this problem, and to whose memory a shaft as high as the Washington Monument should be erected; or the timid Miller who, in his opinion in the Slaughter House Cases (16 Wallace 35), indicated a fear to do his sworn duty of testing the 14th Amendment by Article 5 before enforcing it as genuine and authentic. It was the sworn

duty of the Court, at that period, to examine the credentials of that Amendment before treating as genuine.

To follow a long line of precedents simply because they are precedents, is like a flock of sheep jumping over a stick long since removed, simply because their leader found the stick there when he traversed that spot. It is not expected that the highest Court of this land, if not in the world, would so conduct itself.

The surgeon who performs the Caesarian operation on a patient to save her life; the doctor who removes a growing tumor or cancer from the system; the general who leads his soldiers into battle instead of watching them with a field glass from a neighboring hill; the admiral who bottles up Cervera's fleet or wins the battle of Manila, are all admired as courageous exponents of principles they are identified with. Shall less courage be expected of a Judge to whom weighty issues are confided, which his oath of office suggests to him not to shirk or evade, but to fulfill?

The Nation is entitled to have this Court pass on the validity of these Amendments; the Court itself should do so, to maintain the respect that belongs to it; as well as to retain self-respect. The Congress is entitled to guidance from this Court in settling debated questions on the requisites of valid Constitutional Amendments. The relations between the two races would be determined if the legal status of the African were definitely fixed by this Court. The African himself is innocent of the turmoil his legal status causes. He was brought here *nolens volens* by the slave traders of the New England States, who did not want him there, but were willing to sell him to the Southern States where he proved an efficient laborer on the farms and plantations. The South learned sufficiently of the Negro character to know that these Amendments would not, as intended by their promoters, place the Southern States in the Republican column of States permanently. The expectations of the men who framed and urged these Amendments have not been realized; but contrarily, the once puissant Republican party, responsible for these Amendments, accustomed for many years to write the laws of the Nation, is now hopelessly marooned on the Rock of Negro Suffrage. Its members are now divided into two camps for and against such suffrage. The ex-President who is about to view the scenes and meet the game of South America, used vehement language to denounce the Southern Negro delegates who were potential to procure a presidential nomination for

his opponent, but were impotent to deliver electoral votes; while at the same time he was seeking favor from the Northern Negro delegates who were impotent to procure a nomination but potent in furnishing electoral votes. Now the Democracy is perplexed by the same problem; its President is being urged by Northern Democrats to give official preferment to Negro Democrats who aided that party in its time of need; while the Southern Democrats resent any intrusion of Africans into Federal offices.

Experience has shown that diverse races can not live in amity contiguously. The patient African, from whom Lincoln struck the shackles of slavery, is now the world champion in the prize ring, to meet whom a "white hope" is vainly sought. In competitive lines of business, the Negroes are supplanting whites; in residence blocks of large cities, a transformation of white to black is silently but gradually proceeding, producing not only diminished realty value, but decreased taxation. Like the Huns and the Vandals of old, the Africans are revolutionizing conditions in the United States backwards. In sheer self-defense, the white race owes to itself the duty of making a stand for its life.

When two survivors of the same shipwreck seize a plank of insufficient buoyancy to support both, the stronger is justified in detaching the hold of the weaker, lest two lives be lost instead of one.

Furthermore, persons familiar with Negro characteristics are well aware that if deported to the land of their origin, they would doubtless resume barbaric and cannibalistic methods, viewing with distended eyelids, sleek and rotund missionaries sent by misguided philanthropists for their moral uplift, and prepare with much ceremony for the mastication and absorption of such missionaries.

If these Amendments are all right, they can stand a test. If not, the Country is entitled to know it. The more speedily the knowledge comes to the Country, the better it will be for everybody.

In the last analysis, we are all citizens of a common country, owing allegiance to a common flag, living under the same Constitution, and interested equally in the welfare and advancement of the Country as a whole. While we are, in a sense, Democrats, Republicans, Socialists or Bull Moosers, yet we are also Americans. Anything that will materially ad-

vance the interest of the Nation appeals to all of us, regardless of party affiliations.

It is therefore respectfully urged upon this Honorable Court that, notwithstanding its own previous decisions tacitly affirming the validity of the 14th and 15th Amendments, it will, in order to settle all future doubts, construe Article 5 and determine what is requisite thereunder to constitute a valid Constitutional amendment; then, by utilizing the information herein furnished to the Court, ascertain whether these Amendments meet the construction this Court shall place upon Article 5.

Respectfully Submitted,

J. H. ADRIAANS,

October, 1913.

Amicus Curiae.

APPENDIX

WILLIAM H. SEWARD

Secretary of State of the United States.

To all to whom these presents may come, greeting:

Know ye, that whereas the Congress of the United States, on the first of February last, passed a Resolution which is in the words following, namely:

"A resolution submitting to the legislatures of the several States a Proposition to amend the Constitution of the United States.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of both Houses concurring). That the following Article be proposed to the legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said legislatures, shall be valid, to all intents and purposes, as a part of the said Constitution, namely:

ARTICLE XIII.

"Section 1. Neither slavery nor involuntary servitude except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

"Section 2. Congress shall have authority to enforce this article by appropriate legislation."

And whereas it appears from official documents on file in this Department, that the amendment to the Constitution of the United States proposed as aforesaid has been ratified by the legislatures of the States of Illinois, Rhode Island, Michigan, Maryland, New York, West Virginia, Maine, Kansas, Massachusetts, Pennsylvania, Virginia, Ohio, Missouri, Nevada, Indiana, Louisiana, Minnesota, Wisconsin, Vermont, Tennessee, Arkansas, Connecticut, New Hampshire, South Carolina, Alabama, North Carolina, and Georgia; in all, twenty-seven States.

And whereas the whole number of States in the United States is thirty-six; and whereas the before specially named States, whose legislatures have ratified the said proposed amendment, constitute three-fourths of the whole number of States in the United States:

Now, therefore, be it known that I, William H. Seward, Secretary of State of the United States, by virtue and in pursuance of the second section of the Act of Congress, approved the twentieth of April, eighteen hundred and eighteen, entitled "An Act to provide for the publication of the laws of the United States and for other purposes," do hereby certify that the amendment aforesaid has become valid to all intents and purposes, as a part of the Constitution of the United States.

In testimony whereof, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

Done in the City of Washington, this eighteenth day of December, in the year of our Lord one thousand eight hundred and sixty-five and of the Independence of the United States of America the ninetieth.

[Seal]

WILLIAM H. SEWARD,
Secretary of State.

Approved,

ANDREW JOHNSON,
December 18, 1865.

(Documentary History of the Constitution of the United States. From original sources. Bureau of Roll and Library Vol. 2, p. 636.)

ACTION OF STATES ON FOURTEENTH AMENDMENT TO UNITED STATES CONSTITUTION.

STATE	RATIFICATION	RECORD	DOUBTFUL RATIFICATION	REJECTION	RECORD	REVOCA- TION OF RATIFICATION	REVOCA- TION OF REJECTION
1 Alabama	July 13, 1868	Al. Acts 68 p 138	.....	Feb. 22, 1866..	Acts AL. 65-6 p 697	.....	July 13, 1868
2 Arkansas	April 6, 1868	Acts Ark. 68 p 345	.....	Jan., 1867	Acts Ark. 66-7 p 550	.....	April 6, 1868
3 California .....	.....	.....	.....	.....	.....	.....	.....
4 Connecticut	June 30, 1866	L. Con. Pr. 66 p 38	.....	.....	.....	.....	.....
5 Delaware .....	.....	.....	.....	.....	.....	.....	.....
6 Florida	July 31, 1868	L. Fla. 68 p 175	.....	Feb. 8, 1867	L. Del. 67 p 303	.....	July 31, 1868
7 Georgia	July 21, 1868	L. Ga. 70 p 491	.....	Dec. 9, 1866..	L. Fla. 66 p 36	.....	July 21, 1868
8 Illinois	Jan. 18, 1867	2 Doc. H. C. U. S. p 690	.....	Nov. 12, 1866..	L. Ga. 66 p 216..	.....	.....
9 Indiana	Jan. 29, 1867	L. Ind. 67 p 223	.....	.....	.....	.....	.....
10 Iowa	April 3, 1868	L. Ia. 68 p 232	.....	.....	.....	.....	.....
11 Kansas	Jan. 18, 1867	L. Kan. 67 p 4	.....	.....	.....	.....	.....
12 Kentucky .....	.....	.....	.....	Jan. 10, 1867..	Ky. Acts 67 p 119	.....	.....
13 Louisiana	July 9, 1868	Acts La. 68 p 3	.....	Feb. 9, 1867 ..	Acts La. 67 p 9 ..	.....	.....
14 Maine	Jan. 19, 1867	L. Me. 67 p 37	.....	March 23, 1867	L. Md. 67 p 879..	.....	July 9, 1868.
15 Maryland .....	.....	.....	.....	.....	.....	.....	.....
16 Massachusetts	March 20, 1867	L. Mass. 67 p 787	.....	.....	.....	.....	.....
17 Michigan	Feb. 15, 1867	Ill. Acts 67 p 312	.....	.....	.....	.....	.....
18 Minnesota	Feb. 1, 1867..	3 Doc. H. C. U. S. p 117	.....	.....	.....	.....	.....
19 Mississippi	Jan. 15, 1870..	L. Miss. 70 p 631	.....	Jan. 31, 1867..	L. Miss. 66-7 p 734	.....	Jan. 15, 1870
20 Missouri	Jan. 26, 1867..	Mo. L. 67 p 196	.....	.....	.....	.....	.....
21 Nebraska	June 17, 1867	L. Neb. 67 p 158	.....	.....	.....	.....	.....
22 Nevada	Jan. 28, 1867..	Nev. Stat. 67 p 136	.....	.....	.....	.....	.....
23 New Hampshire	July 7, 1866	L. N. H. 66 p 3290	.....	March 27, 1868	L. N. J. 68 p 1226	March 27, 1868	.....
24 New Jersey	Sept. 11, 1866	L. N. J. 66 p 1113	.....	.....	.....	.....	.....
25 New York	Jan. 10, 1867..	L. N. Y. 67 p 2487	.....	Dec. 14, 1866..	N.C.L. (p a pr) 66-67 p 213..	.....	July 4, 1868
26 North Carolina	July 4, 1868...	L. N. C. 68 p 89..	.....	Oct. 16, 1868..	L. Ohio 68 p 280..	.....	.....
27 Ohio	Jan. 11, 1867	L. Ohio 67 p 320	.....	.....	L. Ore 68 p 111..	Oct. 16, 1868..	.....
28 Oregon	Sept. 13, 1866	L. Ore. 66 p 734	.....	.....	.....	.....	.....
29 Pennsylvania	Feb. 12, 1867	L. Pa. 67 p 1324	.....	.....	.....	.....	.....
30 Rhode Island	Feb. 7, 1867	R.I. L. 67 p 151	.....	.....	.....	.....	.....
31 South Carolina	July 9, 1868...	S.C. & L. 68 p 154	.....	Dec. 20, 1866..	S.C.R. & R. 66 p 220	.....	July 9, 1868
32 Tennessee .....	.....	Tenn. Acts 66 p 23	.....	Nov. 1, 1866...	Tex. L. 66 p 266	.....	.....
33 Texas .....	.....	L. Va. 66 p 81	.....	.....	.....	.....	.....
34 Vermont	Nov. 9, 1866	Vt. L. 66 p 103	.....	Jan. 19, 1867..	Va. A. Ass. 66-7 p 608	.....	Oct. 9, 1869
35 Virginia	Oct. 8, 1869	Va. Ass. 67-70 p 3	.....	.....	.....	.....	.....
36 West Virginia	Jan. 16, 1867	W. Va. A. 67 p 173	.....	.....	.....	.....	.....
37 Wisconsin	Feb. 13, 1867	Wis. L. Gen. 67 p 189	.....	.....	.....	.....	.....

Ratified: Conn.; Ill.; Ind.; Iowa; Kansas; Me.; Mass.; Mich.; Minn.; Mo.; Neb.; Nev.; N. M.; N. Y.; Pa.; R. I.; Vt.; W. Va.; Wis. 19
 Doubtful or irregular ratification*: Tennessee 1
 Rejected: Delaware; Kentucky; Maryland; Texas 4
 Acting both ways: Ala.; Ark.; Fla.; Ga.; La.; Miss.; N. J.; N. C.; Ohio; Oregon; S. C.; Va. 12
 Not Acting: California 1

JOINT RESOLUTION NUMBER I.

Joint resolution, ratifying the amendment of the Constitution of the United States.

1. *Be it Resolved by the Senate and General Assembly of the State of New Jersey*, That the amendment of the Constitution of the United States proposed at the first session of the Thirty-ninth Congress by resolution of the Senate and House of Representatives of the United States of America, in Congress assembled, to the several state legislatures, be and the same is hereby ratified upon the part of this legislature, and made a part of the Constitution of the United States of America, said amendment being in the following words, to wit:

* * * * *

Laws of New Jersey, 1866; pp. 1113, 1114.

JOINT RESOLUTION NUMBER IV.

Withdrawing the consent of this State to the proposed Amendment of the Constitution of the United States, entitled Article Fourteen, and rescinding the joint resolution, approved September eleventh, anno domini eighteen hundred and sixty-eight, whereby it was resolved that said proposed Amendment was ratified by the legislature of this State.

The legislature of the State of New Jersey having seriously and deliberately considered the present situation of the United States, do declare and make known: That the basis of all government is the consent of the governed, and all constitutions are contracts between the parties bound thereby; that until any proposition to alter the fundamental law, to which all the States have consented, has been ratified by such number of the States as by the Federal Constitution makes it binding upon all, anyone that has assented is at liberty to withdraw that assent, and it becomes its duty to do so, when, upon mature consideration, such withdrawal seems to be necessary to the safety and happiness of all; prudence dictates that a consent once given should not be recalled for light and transient causes; but the right is a natural right, the exercise of which is accompanied with no injustice to any of the parties; it has, therefore, been universally recognized as inhering in every party, and has ever been left unimpaired by any positive regulation.

The proposed amendment not having yet received the assent of the three-fourths of the States, which is necessary to make it valid, the natural and constitutional right of this State to withdraw its assent is undeniable. With these impressions, and with a solemn appeal to the Searcher of all Hearts for the rectitude of our intentions, and under the conviction that the origin and objects of said proposed amendment were unseemly and unjust, and that the necessary results of its adoption must be the disturbance of the harmony, if not the destruction, of our system of self-government, and that it is our duty to ourselves and our sister States to expose the same, do further declare:

That it being necessary by the Constitution that every amendment to the same should be proposed by two-thirds of both Houses of Congress, the authors of said proposition, for the purpose of securing the assent of the requisite majority, determined to, and did, exclude from the said two houses eighty representatives from eleven States of the Union, upon the pretense that there were no such States in the Union; but finding that two-thirds of the remainder of the said houses could not be brought to assent to the said proposition, they deliberately formed and carried out the design of mutilating the integrity of the United States Senate, and without pretext or justification, other than the possession of the power, without the right, and in palpable violation of the Constitution, ejected a member of their own body, representing this State, and thus practically denied to New Jersey its equal suffrage in the Senate, and thereby nominally secured the vote of two-thirds of the said houses.

The object of dismembering the highest representative assembly in the nation and humiliating a State of the Union, faithful at all times to all its obligations, and the object of said amendment were one: to place new and unheard-of powers in the hands of a faction, that it might absorb to itself all the executive, judicial and legislative power necessary to secure for itself immunity for the unconstitutional acts it had already committed, and those it has since inflicted on a too patient people.

The subsequent usurpations of these once national assemblies, in passing pretended laws for the establishment in ten States of martial law, which is nothing but the will of the military commander, and therefore inconsistent with the very nature of all law, for the purpose of reducing to slavery men of

their own race in those States, or compelling them contrary to their own convictions, to exercise the elective franchise in obedience to the dictation of a faction in those assemblies; the attempt to commit to one man, arbitrary and uncontrollable power, which they have found necessary to exercise to force the people of those States, into compliance with their will; the authority given to the Secretary of War to use the name of the President, to countermand the President's orders and to certify military orders to be "by the direction of the President," when they were notoriously known to be contrary to the President's direction, thus keeping up the form of the constitution to which the people are accustomed, but practically deposing the President from his office of commander-in-chief, and suppressing one of the great departments of the government, that of the executive; the attempt to withdraw from the supreme judicial tribunal of the nation, the jurisdiction to examine and decide upon the conformity of their pretended laws to the Constitution, which was the chief function of that august tribunal, as organized by the fathers of the republic; all are but amplified explanations of the power they hoped to acquire by the adoption of the said amendment.

To conceal from the people the immense alterations of the fundamental law they intended to accomplish by the said amendment, they gilded the same with propositions of justice drawn from the State constitutions; but like all the essays of unlawful power to commend its designs to popular favor, it is marked by the most absurd and incoherent provisions.

It proposes to make it a part of the Constitution of the United States that naturalized citizens of the United States shall be citizens of the United States; as if they were not so without such absurd declaration.

It lodges with the legislative branch of the Government the power of pardon, which properly belongs, by our system, to the executives.

It denounces and inflicts punishment for past offenses by constitutional provisions, and thus would make the whole people of this great nation in their most solemn and sovereign act, guilty of violating a cardinal principle of American liberty: that no punishment can be inflicted for any offense, unless it is provided by law before the commission of the offense.

It usurps the power of punishment, which, in any coherent system of government, belongs to the judiciary, and commits it to the people in their sovereign capacity.

It degrades the nation, by proclaiming to the world that no confidence can be placed in its honesty or morality.

It appeals to the fears of the public creditors by publishing a libel on the American people, and fixing it forever in the national Constitution, as a stigma upon the present generation, that there must be constitutional guards against a repudiation of the public debt; as if it were possible that a people who were so corrupt as to disregard such an obligation would be bound by any contract, constitutional or otherwise.

It imposes new prohibitions upon the power of the State to pass laws, and interdicts the execution of such parts of the common law, as the national judiciary may esteem inconsistent with the vague provisions of the said amendment, made vague for the purpose of facilitating encroachments upon their lives, liberties, and property of the people.

It enlarges the judicial power of the United States so as to bring every law passed by the State, and every principle of the common law, relating to life, liberty, or property within the jurisdiction of the Federal tribunals, and charges these tribunals with duties, to the performance of which, they, from their nature and organization, and their distance from the people are unequal.

It makes a new apportionment of representation, in the national councils, for no other reason than thereby to secure to a faction a sufficient number of the votes of a servile and ignorant race to outweigh the intelligent voices of their own.

It sets up a standard of suffrage dependent entirely upon citizenship, majority, inhabitancy and manhood, and any interference whatever by the State, imposing any other reasonable qualifications, as time of inhabitancy, causes a reduction of the State's representation.

But the demand of the supporters of this amendment in this State: that Congress should compel the people of New Jersey to adopt what is called "impartial suffrage," makes it apparent that this section was intended to transfer to Congress the whole control of the right of suffrage in the State, and to deprive the State of a free representation by destroying the power of regulating suffrage within its own limits, a power which they have never been willing to surrender to the general Government, and which was reserved to the States as the fundamental principle on which the Constitution itself was constructed, the principle of self-government.

This section, as well as all others of the amendment, is

couched in ambiguous, vague, and obscure language, the uniform report of those who seek to encroach upon public liberty; strictly construed, it dispenses entirely with a House of Representatives, unless the State shall abrogate every qualification, and especially that of time of inhabitancy, without which the right of suffrage is worthless.

This legislature, feeling confident of the support of the largest majority of the people that has ever given expression to the public will, declare that the said proposed amendment being designed to confer, or to compel the States to confer the sovereign right of the elective franchise upon a race which has never given the slightest evidence, at any time, or in any quarter of the globe, of its capacity for self-government, and erect an impracticable standard of suffrage, which will render the right valueless to any portion of the people, was intended to overthrow the system of self-government under which the people of the United States have for eighty years enjoyed their liberties, and is unfit from its origin, its object and its matter to be incorporated with the fundamental laws of a free people, therefore,

1. *"Be it Resolved by the Senate and General Assembly of the State of New Jersey, That the joint resolution approved September eleventh, anno domini eighteen hundred and sixty-six, relative to amending the Constitution of the United States, which is in the following words, to-wit:*

"Joint Resolution ratifying the Amendment of the Constitution of the United States.

1. *Be it Resolved by the Senate and General Assembly of the State of New Jersey, That the Amendment to the Constitution of the United States proposed at the first session of the Thirty-ninth Congress, by a resolution of the Senate and House of Representatives of the United States of America in Congress assembled, to the several State legislatures, be, and the same is hereby ratified upon the part of this legislature, and made a part of the Constitution of the United States of America, said amendment being in following words, to-wit:*

* * * * *

Be and the same is hereby rescinded and the consent on behalf of the State of New Jersey to ratify the proposed Fourteenth Amendment to the Constitution of the United States, is hereby withdrawn.

2. *"And be it Resolved, That copies of the foregoing preamble and resolution, certified to by the President of the*

Senate and Speaker of the General Assembly, be forwarded to the President of the United States, the Secretary of State of the United States, and to each of our Senators and Representatives in Congress, and to the Governors of the respective States.

3. *"And be it Resolved, That these resolutions shall take effect immediately."*

Passed March 27, 1868. (Laws of New Jersey, 1868, pp. 1225-1231.)

RESOLUTION REJECTING THE PROPOSED AMENDMENT AS THE FOURTEENTH ARTICLE OF THE CONSTITUTION OF THE UNITED STATES.

Resolved, That the General Assembly of the State of North Carolina do not ratify the Amendment proposed as the Fourteenth Article of the Constitution of the United States.

Ratified the 14th day of December, A. D. 1866. (North Carolina Laws, 1866-'67, public and private laws, p. 213.)

A JOINT RESOLUTION RATIFYING THE PROPOSED AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, STYLED ARTICLE FOURTEEN.

WHEREAS, The General Assembly has received notification of the passage by both Houses of the 39th Congress of the United States at its first session, of the following proposition to amend the Constitution of the United States by a constitutional majority of two-thirds thereof, in words, viz.:

"Joint resolution proposing an amendment to the Constitution of the United States.

"Be it resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, two-thirds of both Houses concurring, That the following article be proposed to the legislatures of the several States, as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said Legislatures, shall be valid as a part of the Constitution of the said United States, viz.:

ARTICLE FOURTEEN.

* * * *

Therefore,

Resolved, That the said amendment to the Constitution of

the United States be, and the same is hereby ratified by the General Assembly of the State of North Carolina.

"Resolved, That certified copies of the foregoing preamble and resolution be forwarded by the Governor to the President of the United States, to the Presiding Officer of the United States Senate, and the Speaker of the United States House of Representatives.

Ratified the 4th day of July, A. D. 1868.

(LAWS OF NORTH CAROLINA, PUBLIC EX. SESS. 1868, P. 89.)

JOINT RESOLUTION.

Relative to an amendment of the Constitution of the United States:

WHEREAS, The General Assembly has received official notification of the passage by both Houses of the Thirty-ninth Congress of the United States, at its first session, of the following proposition to amend the Constitution of the United States, by a constitutional majority of two-thirds thereof, in the words following, to-wit:

"Joint Resolution proposing an amendment to the Constitution of the United States.

"Be it resolved by the Senate and House of Representatives of the United States of America, in Congress assembled (two-thirds of both Houses concurring,) That the following article be proposed to the legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said legislatures, shall be valid as a part of the Constitution, namely:

ARTICLE XIV.

(Here follow the five sections of the Article.)

"And Whereas, Three-fourths of the legislatures of the States composing the United States are required to give assent to the proposed amendment to the Constitution of the United States, before it becomes a part thereof; therefore,

"Resolved by the General Assembly of the State of Ohio, That we hereby ratify, on behalf of the State of Ohio, the above recited proposed amendment to the Constitution of the United States.

"Resolved, That certified copies of the foregoing preamble and resolution be forwarded by the Governor of Ohio to the President of the United States, to the presiding officer of the

United States Senate, and the Speaker of the United States House of Representatives.

ED. A. PARROT,

"Speaker of the House of Representatives.

ANDREW G. MCBURNEY,

President of the Senate.

"Adopted January 11, 1867."

(Laws of Ohio, 1867, p. 320.)

JOINT RESOLUTION.

Relating to withdrawing the assent of the State of Ohio from the proposed Fourteenth Constitutional Amendment.

Rescinding resolution passed January 11, A. D. 1867, relative to amending the Constitution of the United States, and withdrawing the assent of the State of Ohio to the proposed Fourteenth Constitutional Amendment.

WHEREAS, On the 11th day of January, A. D. 1867, the following joint resolution was adopted by the General Assembly of the State of Ohio, to-wit:

WHEREAS, The General Assembly has received official notification of the passage by both Houses of the Thirty-ninth Congress of the United States at the first session of the following proposition to amend the Constitution of the United States, by a constitutional majority of two-thirds thereof, in the words following, to-wit:

"Joint Resolution, proposing an amendment to the Constitution of the United States.

"That the following article be proposed by the legislatures of the several States, as an amendment to the Constitution of the United States, which when ratified by three-fourths of said legislatures, shall be valid as a part of the Constitution, namely:

ARTICLE XIV.

(Here follow the five sections of the Article.)

"AND WHEREAS, Three-fourths of the legislatures of the States composing the United States are required to give assent to the proposed amendment to the Constitution of the United States, before it becomes a part thereof; therefore,

"Resolved by the General Assembly of the State of Ohio, That we hereby ratify, on behalf of the State of Ohio, the above recited proposed amendment to the Constitution of the United States.

"Resolved, That certified copies of the foregoing preamble and resolutions be forwarded by the Governor of Ohio to the President of the United States, to the Presiding Officer of the United States Senate, and the Speaker of the United States House of Representatives."

AND WHEREAS, No amendment to the Constitution of the United States is valid until duly ratified by three-fourths of all the States composing the United States, and until such ratification is completed, any State has a right to withdraw her assent to any proposed amendment;

AND WHEREAS, Several distinct propositions are combined in the said proposed amendment, several of which are already fully provided for in the Constitution of the United States, and to which no person or party objects; therefore, be it

Resolved by the General Assembly of the State of Ohio, That the above recited resolution be, and the same is hereby rescinded, and the ratification on behalf of the State of Ohio, of the above recited proposed amendment to the Constitution of the United States, is hereby withdrawn and refused.

Resolved, That copies of the foregoing preamble and resolutions, certified to by the Speaker of the House of Representatives and the President of the Senate, be forwarded to the President of the United States, to each of our Senators and Representatives in Congress, and to each of the Governors of the respective States.

Resolved, That the President of the United States be respectfully requested to cause to be forwarded to the Governor of Ohio any and all papers on file on the executive department at Washington, certifying the ratification by the General Assembly of Ohio of said proposed constitutional amendment, and that the Presiding Officer of the United States Senate, and the Speaker of the United States House of Representatives be requested to return to the same officer any certificates that may have been filed with them, or either of them, on the subject of said ratification.

JOHN F. FOLLETT,
Speaker of the House of Representatives.

J. C. LEE,
President of the Senate.

January 15, A. D. 1868.
(Laws of Ohio of 1868, p. 280.)

SENATE JOINT RESOLUTION No. 3.

WHEREAS, The Congress of the United States did, by concurrent resolution adopted at the first session of the Thirty-ninth Congress, propose to the legislatures of the several States the following amendment to the Constitution of the United States, namely:

ARTICLE 14.

* * * *

Be it resolved by the Legislative Assembly of the State of Oregon, That the said amendment to the Constitution of the United States be and the same is hereby ratified.

Passed the Senate, September 14, 1866.

T. R. CORNELIUS,

President of the Senate.

Passed the House of Representatives, September 19, 1866.

F. A. CHENOWETH,

Speaker of the House of Representatives.

J. C. PEEBLES,

Chief Clerk of the Senate

T. McF. PATTEN,

Chief Clerk of the House of Representatives.

SENATE JOINT RESOLUTION No. 4.

Rescinding Resolution passed September 19, 1866, relative to amending the Constitution of the United States, and withdrawing the assent of the State of Oregon to the proposed 14th Constitutional Amendment.

WHEREAS, On the 19th day of September, 1866, the following preamble and joint resolution was (were) adopted by the Legislative Assembly of the State of Oregon, to-wit:

WHEREAS, The Congress of the United States did, by concurrent resolution adopted at the first session of the Thirty-ninth Congress, propose to the legislatures of the several States the following amendment to the Constitution of the United States, namely:

ARTICLE XIV.

* * * *

"Therefore be it resolved by the Legislative Assembly of the State of Oregon, That the said amendment to the Constitution of the United States be and the same is hereby ratified";

AND WHEREAS, No amendment to the Constitution of the

United States is valid until duly ratified by three-fourths of all the States comprising the United States; and until such ratification is completed, any State has the right to withdraw its assent to any proposed amendment;

AND WHEREAS, Hon. William H. Seward, Secretary of State of the United States, on the 28th day of July, 1868, issued a proclamation, reciting among other things that the said proposed amendment was ratified by the Legislatures of the States of Arkansas, Florida, Louisiana, Alabama, South Carolina, and Georgia, and that the same was adopted by more than three-fourths of the States of the United States;

AND WHEREAS, the newly constituted and newly established bodies avowing themselves to be and acting as legislatures respectively, of the States of Arkansas, Florida, North Carolina, Louisiana, South Carolina, Alabama, and Georgia, were created by military despotism, against the will of the legal voters of the said States, under the reconstruction acts (so-called) of Congress, which are usurpations, unconstitutional, revolutionary, and void; and consequently the acts of such bodies can not legally ratify the said proposed constitutional amendment for the States which they pretend to represent, nor effect the rights of the other States of the Union.

AND WHEREAS, Also the said resolution, ratifying the said proposed amendment to the Constitution of the United States, was adopted by the House of Representatives of the State of Oregon, on the 19th day of September, 1866, by a vote of twenty-five yeas to twenty-two nays, and passed by means of the votes of Thomas H. Brenty and M. M. McKean, who were illegally and fraudulently returned as members of the said House of Representatives from the County of Grant, by the said Brenty, then acting as County Clerk and canvasser of election returns for said County;

AND WHEREAS, On the 23rd day of September, 1886, the said Thomas H. Brenty and M. M. McKean were declared not entitled to the seats which they had usurped, and on the same day J. M. McCoy and G. W. Kinsley were declared to be duly elected members from the County of Grant, and who, on the 29th day of September, 1866, entered their protest on the journals of the House of Representatives, and declared therein that, if they had not been excluded from the seats to which they were entitled, they would have voted against the resolution ratifying the said proposed constitutional amendment, and thereby defeated the adoption of the same;

AND WHEREAS, On the 6th day of October, 1866, the House of Representatives of this State adopted a resolution declaring that the action of that body in ratifying the said proposed constitutional amendment, did not express the will of the said House as it then stood, after being purged of its illegal members; therefore

Be it Resolved by the Legislative Assembly of the State of Oregon, That the above recited resolution, adopted by the legislative assembly on the 19th day of September, 1866, by fraud, be and the same is hereby rescinded, and the ratification on behalf of the State of Oregon of the above recited proposed amendment to the Constitution of the United States, is hereby withdrawn and refused.

Resolved, That any amendment to the Constitution of the United States on the subject of representation should be proposed by a Congress in which all the States are represented, or by a convention of all the States, where each could be heard in the proposing as well as in the subsequent ratification of such amendment.

Resolved, That the Secretary of State be directed to forward certified copies of the foregoing preamble and resolutions, without delay, to the President of the United States, to the Secretary of State of the United States, to the President of the Senate, and to the Speaker of the House of Representatives of the United States.

Adopted by the House, October 15, 1868.

JOHN WHITAKER,

Speaker of the House of Representatives.

Adopted by the Senate, October 16, 1868.

B. F. BURD,

President of the Senate.

(Laws of Oregon 1868, p. 111.)

COMMITTEE ON FEDERAL RELATIONS.

(In the House of Representatives), Dec. 19, 1866.

The Committee on Federal Relations, to whom was referred the communication of Hon. Wm. H. Seward, Secretary of State of the United States, to His Excellency the Governor, transmitting certain proposed amendments to the Constitution of the United States, ask leave to report, that they have considered the same, and recommend that the proposed amendments be not adopted.

Resolved, That the House do agree to the report.

Ordered, That it be sent to the Senate for concurrence.

By order

JOHN P. SLOAN, C. H. R.

In the Senate, Dec. 20, 1866.

Resolved, That the Senate do concur in the report.

Ordered, That it be returned to the House of Representatives.

By order

WM. E. MARTIN.

(South Carolina Reports and Resolutions, 1866, p. 220.)

NO. 72. JOINT RESOLUTION RATIFYING THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

WHEREAS, both Houses of the Thirty-ninth Congress of the United States, at its first session, by a constitutional majority of two-thirds thereof made the following proposition to amend the Constitution of the United States, in words following, to-wit:

"Joint Resolution Proposing Amendment of the Constitution of the United States."

Be it Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, (two-thirds of both Houses concurring), That the following Article be proposed to the Legislatures of the several States, as an amendment to the Constitution of the United States, which, when ratified by three-fourths of the said Legislatures, shall be valid as a part of the Constitution, viz.:

ARTICLE XIV.

* * * *

Therefore, Resolved, That the said proposed amendment to the Constitution be, and the same is hereby, ratified by the General Assembly of the State of South Carolina.

Resolved, That certified copies of the foregoing preamble and resolutions be forwarded by the Governor to the President of the United States, to the Presiding Officer of the

United States Senate, and the Speaker of the United States House of Representatives.

In the Senate House, the ninth day of July, in the year of our Lord one thousand eight hundred and sixty-eight.

DAVID P. CORBIN,

President of the Senate pro tem.

FRANKLIN J. MOSES, JR.,

Speaker of the House of Representatives.

Approved:

ROBERT K. SCOTT, *Governor.*

(South Carolina Constitution and Laws, 1868, p. 154.)

To the Senate of the United States:

I transmit to the Senate a report from the Secretary of State inclosing a list of the States of the Union whose legislatures have ratified the proposed Fourteenth Article of amendment to the Constitution of the United States; and also a copy of resolutions of ratification as called for in the Senate resolutions of the 9th instant, together with a copy of the respective resolutions of the legislatures of Ohio and New Jersey, purporting to rescind the resolutions of ratification of said amendment, which had previously been adopted by the legislatures of these two States, respectively, or to withdraw their consent to the same.

ANDREW JOHNSON.

July 14, 1868.

WILLIAM H. SEWARD, Secretary of State of the United States.

To all to whom these presents come, greeting:

WHEREAS the Congress of the United States on or about the 16th of June, in the year 1866, passed a resolution which is in the words and figures following, to-wit:

"Joint resolution proposing an amendment to the Constitution of the United States.

"*Be it resolved by the Senate and House of Representatives of the United States of America in Congress Assembled (Two thirds of both Houses concurring), That the following article be proposed to the legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of the said legislatures, shall be valid as part of the Constitution, namely:*

"ARTICLE XIV."

AND WHEREAS by the second section of the act of Congress approved the 20th of April, 1818, entitled, "An act to provide for the publication of the laws of the United States, and for other purposes," it is made the duty of the Secretary of State forthwith to cause any amendment to the Constitution of the United States which has been adopted according to the provisions of the said Constitution to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted and that the same has become valid to all intents and purposes as a part of the Constitution of the United States; and

WHEREAS neither the act just quoted from nor any other law expressly or by conclusive implication, authorizes the Secretary of State to determine and decide doubtful questions as to the authenticity of the organization of State legislatures or as to the power of any State legislature to recall a previous act or resolution of ratification of any amendment proposed to the Constitution; and

WHEREAS it appears from official documents on file in this Department that the amendment to the Constitution of the United States proposed as aforesaid has been ratified by the legislatures of the States of Connecticut, New Hampshire, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, Rhode Island, Wisconsin, Pennsylvania, Michigan, Massachusetts, Nebraska, and Iowa; and

WHEREAS it further appears from documents on file in this Department that the amendment to the Constitution of the States proposed aforesaid has also been ratified by newly constituted and newly established bodies avowing themselves to be and acting as the legislatures, respectively, of the States of Arkansas, Florida, North Carolina, Louisiana, South Carolina, and Alabama; and

WHEREAS it further appears from official documents on file in this Department that the legislatures of two of the States first above enumerated, to-wit: Ohio and New Jersey, have since passed resolutions, respectively, withdrawing the consent of each of said States to the aforesaid amendment; and

WHEREAS it was deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual for withdrawing the consent of the said two States, or of either of them, to the aforesaid amendment; and

WHEREAS the whole number of States in the United States is thirty-seven, to-wit: New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Vermont, Kentucky, Tennessee, Ohio, Louisiana, Indiana, Mississippi, Illinois, Alabama, Maine, Missouri, Arkansas, Michigan, Florida, Texas, Iowa, Wisconsin, Minnesota, California, Oregon, Kansas, West Virginia, Nevada and Nebraska; and

WHEREAS the twenty-three States first hereinbefore named, whose legislatures have ratified the said proposed amendment, and the six States next thereafter named as having ratified the said proposed amendment by newly constituted and established bodies, together constitute three-fourths of the whole number of States in the United States;

Now, therefore, be it known that I, William H. Seward, Secretary of State of the United States, by virtue and in pursuance of the second section of the Act of Congress approved the 20th of April, 1818, hereinbefore recited, do hereby certify that if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed so remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those States, which purport to withdraw the consent of said States from such ratification, then the aforesaid amendment has been ratified in the manner hereinbefore mentioned, and so has become valid to all intents and purposes as a part of the Constitution of the United States.

In testimony whereof I have hereunto set my hand and caused the seal of the Department of State to be affixed.

Done at the City of Washington this 20th day of July, in the year of our Lord 1868, and of the independence of the United States of America the ninety-third.

WILLIAM H. SEWARD,

[SEAL]

Secretary of State.

Page 783, Documentary History of the Constitution of the United States.

From original sources, Bureau of Rolls and Library, Volume 2.

WASHINGTON, July 14, 1868.

Mr. Sherman submitted the following resolution; which

was considered by unanimous consent and agreed to as follows:

"WHEREAS the Legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, West Virginia, Kansas, Missouri, Indiana, Ohio, Illinois, Minnesota, New York, Wisconsin, Pennsylvania, Rhode Island, Michigan, Nevada, New Hampshire, Massachusetts, Nebraska, Maine, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the Fourteenth Amendment to the Constitution of the United States duly proposed by two-thirds of each House of the Thirty-ninth Congress; Therefore,

"Resolved by the Senate (the House concurring), That said Fourteenth Article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated by the Secretary as such.

"Ordered, That the Secretary request the concurrence of the House of Representatives in said resolution."

WILLIAM H. SEWARD,

Secretary of State of the United States.

To all to whom these presents may come, greeting:

WHEREAS by an Act of Congress passed on the twentieth day of April, one thousand eight hundred and eighteen, entitled, "An Act to provide for the publication of the laws of the United States and for other purposes," it is declared that whenever official notice shall have been received at the Department of State that any amendment which heretofore has been adopted according to the provisions of the Constitution, it shall be the duty of the said Secretary of State forthwith to cause said amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid to all intents and purposes as a part of the Constitution of the United States.

AND WHEREAS the Congress of the United States, on or about the sixteenth of June, one thousand eight hundred and sixty-six, submitted to the Legislatures of the several States a proposed amendment to the Constitution in the following words, to wit:

* * * * *

ARTICLE XIV.

* * * * *

And whereas the Senate and House of Representatives of the Congress of the United States, on the twenty-first day of July, one thousand eight hundred and sixty-eight, adopted and transmitted to the Department of State a concurrent resolution, which concurrent resolution is in the words and figures following, to wit:

In Senate of the United States, July 21, 1868.

WHEREAS the Legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, West Virginia, Kansas, Missouri, Indiana, Ohio, Illinois, Minnesota, New York, Wisconsin, Pennsylvania, Rhode Island, Michigan, Nevada, New Hampshire, Massachusetts, Nebraska, Maine, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the Fourteenth Article of Amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the thirty-ninth Congress; therefore

Resolved by the Senate (the House of Representatives concurring) that said Fourteenth Article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State.

Attest.

GEORGE C. GORHAM, *Secretary.*

In the House of Representatives.

JULY 21, 1868.

Resolved, That the House of Representatives concur in the foregoing Concurrent Resolution of the Senate "declaring the ratification of the Fourteenth Article of Amendment of the Constitution of the United States.

Attest.

EDWARD McPHERSON, *Clerk."*

AND WHEREAS official notice has been received at the Department of State that the Legislatures of the several States next hereinafter named, have, at the times respectively herein mentioned, taken the proceedings hereinafter recited upon or in relation to the ratification of the said proposed Amendment, called Article Fourteenth, namely:

- The Legislature of Connecticut ratified the Amendment June 30, 1866.
- " " " New Hampshire ratified the Amendment July 7, 1866.
- " " " Tennessee ratified the Amendment July 19, 1866.
- " " " New Jersey ratified the Amendment Sep. 11, 1866.
and the Legislature of the same State passed a resolution in April, 1868, to withdraw its consent to it;
- " " " Oregon ratified the Amendment Sept. 19, 1866.
- " " " Texas rejected the Amendment Nov. 1, 1866.
- " " " Vermont ratified the Amendment on or previous to Nov. 9, 1866.
- " " " Georgia rejected the Amendment Nov. 13, 1866.
and the Legislature of the same State ratified it July 21, 1868;
- " " " North Carolina rejected it Dec. 4, 1866.
and the Legislature of the same State ratified it July 4, 1868;
- " " " South Carolina rejected it Dec. 20, 1866,
and the Legislature of the same State ratified it July 9, 1868;
- " " " Virginia rejected it Jan. 9, 1867.
- " " " Kentucky rejected it Jan. 10, 1867.
- " " " New York ratified it Jan. 9, 1867.
- " " " Ohio ratified it Jan. 11, 1867,
and the Legislature of the same State passed a resolution in January, 1868, to withdraw its consent to it;
- " " " Illinois ratified it Jan. 15, 1867.
- " " " Kansas ratified it Jan. 18, 1867.
- " " " Maine ratified it Jan. 19, 1867.
- " " " Nevada ratified it Jan. 22, 1867.
- " " " Missouri ratified it on or previous to Jan. 26, 1867.
- " " " Indiana ratified it Jan. 29, 1867.
- " " " Minnesota ratified it Feb. 1, 1867.
- " " " Rhode Island ratified it Feb. 7, 1867.

The Legislature of Delaware rejected it Feb. 7, 1867.

- " " " Pennsylvania ratified it Feb. 13, 1867.
- " " " Michigan ratified it Feb. 15, 1867.
- " " " Massachusetts ratified it March 20, 1867.
- " " " Maryland rejected it March 23, 1867.
- " " " Nebraska ratified it June 15, 1867.
- " " " Iowa ratified it April 3, 1868.
- " " " Arkansas ratified it April 6, 1868.
- " " " Florida ratified it June 9, 1868.
- " " " Louisiana ratified it July 9, 1868.
- " " " Alabama ratified it July 13, 1868.

Now, therefore,, be it known that I, William H. Seward, Secretary of State of the United States, in execution of the aforesaid act and the aforesaid concurrent resolution of the 21st of July, 1868, and in conformance thereto, do hereby direct the said proposed amendment to the Constitution of the United States to be published in the newspapers authorized to promulgate the laws of the United States, and I do hereby certify that the said proposed amendment has been adopted, in the manner hereinbefore mentioned, by the States specified in the said concurrent resolution, namely: the States of Connecticut, New Hampshire, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, Rhode Island, Wisconsin, Pennsylvania, Michigan, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Louisiana, South Carolina, Alabama, and also by the Legislature of the State of Georgia, the States thus specified being more than three-fourths of the States of the United States.

And I do further certify that the said amendment has become valid to all intents and purposes as a part of the Constitution of the United States.

In testimony whereof, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

Done at the City of Washington this twenty-eighth day of July, in the year of Our Lord, one thousand eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-third.

[SEAL]

WILLIAM H. SEWARD,
Secretary of State.

Action of States on Fifteenth Amendment to United States Constitution.

STATE	RATIFICATION	RECORD	DOUBTFUL RATIFICATION	REJECTION	RECORD	REVOCA- TION OF RATIFICATION	REVOCA- TION OF REJECTION
1 Alabama	Nov. 24, 1869.	A. Acts 69-70 p 469		Jan. 25, 1870..	Cal. Stat. 69 p 913		
2 Arkansas	March 30, 1869	A. Ark. 68-9 p 309		March 18, 1869	3 Del. L. 69 p 653		
3 California	May 19, 1869	L. Conn. Fr. 69 p 3					
4 Connecticut	June 15, 1869	L. Fla. 69 p 53					
5 Delaware	Feb. 2, 1870	L. Ga. 70 p 493					
6 Florida	March 15, 1869	Ill. L. Pub. 69 p 417					
7 Georgia	Feb. 2, 1870	L. Ind. 69 p 128..	May 14, 1869				
8 Illinois	Feb. 2, 1870	L. Ia. 70 p 242	Jan. 19, 1870	March 15, 1869	1 Ky. Acts 69 p 119		
9 Indiana	March 5, 1869	L. Kan. 70 p 346.					
10 Iowa	March 15, 1869	A. La. 68-70 p 56					
11 Kansas	March 15, 1869	L. Me. 69 p 42		April 4, 1870..	Med. L. 75 p 931		
12 Kentucky	March 12, 1869	L. Mass. 69 p 335					
13 Louisiana	March 8, 1869	L. Mich. A. 69 p 321					
14 Maryland	Jan. 19, 1870.	Min. G. L. 70 p 202					
15 Massachusetts	Jan. 15, 1870.	L. Miss. 70 p 425					
16 Michigan	Feb. 17, 1870.	Mo. L. 70 p 562	Jan. 16, 1870				
17 Minnesota	July 7, 1869	L. Neb. 70-71 p 49	March 1, 1869				
18 Mississippi	Feb. 21, 1870	Stat. Nev. 69 p 202					
19 Missouri	Feb. 21, 1870	N. H. L. 69 p 207					
20 Nebraska	April 14, 1869	L. N. Y. 70 p 137		Feb. 15, 1870.	L. N. Y. 70 p 214		Feb. 21, 1870
21 Nevada	March 5, 1869	N. C. L. 68-9 p 709		Jan. 5, 1870..	2d N. Y. 70 p 214		Jan. 5, 1870
22 New Hampshire	Jan. 27, 1870.	O. L. 70 p 146		May 4, 1869..	O. L. 69 p 424....		Jan. 27, 1870
23 New Jersey	March 24, 1869	Pa. L. 69 p 1254		Oct. 24, 1870..	Tenn. Acts 69-70		
24 New York	Jan. 18, 1870.	R. I. A. & R. 70 p 206			p 712		
25 North Carolina	March 16, 1869	L. S. C. 68-9 p 258					
26 Ohio	Feb. 15, 1870.	3 Doc. H. C. U. S.					
27 Oregon	Oct. 21, 1869	L. Vt. 69 p 61					
28 Pennsylvania	Oct. 8, 1869	Va. L. 69-70 p 2					
29 Rhode Island	March 3, 1869	3 Doc. H. C. U. S.					
30 South Carolina	March 3, 1869	p 205					
31 Tennessee	March 3, 1869	W. Va. G. L. 69 p 270					
32 Texas							
33 Vermont							
34 Virginia							
35 West Virginia							
36 Wisconsin							
37 Wisconsin							

Ratified: Ala.; Ark.; Cal.; Fla.; Ga.; Ill.; Iowa; La.; Me.; Mass.; Mich.; Minn.; Miss.; Neb.; N. H.; N. C.; Pa.; R. I.; S. C.; Tex.; Vt.; Va.; W. Va.

Doubtful or irregular classifications: Indiana; Kansas; Missouri; Nevada

Rejected: California; Delaware; Kentucky; Maryland; Oregon; Tennessee

Acting both ways: New Jersey; New York; Ohio

Not acting: None

Revoked ratification: New York

Revoked rejection: New Jersey

Rejection under Reconstruction Acts: Ala.; Ark.; Ga.; La.; Miss.; N. C.; S. C.; Tex.; Va.

Challenged ratification as unconstitutional: Ala.; Ark.; Ga.; La.; Miss.; N. C.; S. C.; Tex.; Va.

Challenged rejection as unconstitutional: Ala.; Ark.; Ga.; La.; Miss.; N. C.; S. C.; Tex.; Va.

Challenged both ways: New Jersey; New York; Ohio

JOINT RESOLUTION, No. 1.

Rejecting the Amendment to the Constitution, known as the Fifteenth Amendment:

1. *Be it Resolved by the Senate and General Assembly of the State of New Jersey*, That the Legislature of this State refuse to ratify, and do hereby reject the amendment to the Constitution of the United States proposed at the third session of the Fortieth Congress by a resolution of the Senate and House of Representatives of the United States of America, in Congress assembled, to the several State Legislatures; said amendment being in the following words, to-wit:

ARTICLE 15.

* * * *

2. *Resolved*, That the right to regulate suffrage is one of the reserved rights of the States, and the attempt to vest this power in Congress is revolutionary, and destructive of our present form of government.

Approved February 15, 1870.

STATE OF NEW JERSEY:

I, Henry C. Kelsey, Secretary of State of the State of New Jersey, do hereby certify, that the foregoing is a true copy of a joint resolution passed by the Legislature of this State, and approved by the Governor the twenty-first day of February, A. D. 1871, as taken from and compared with the original now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal, this sixteenth day of March, Eighteen hundred and seventy-one.

HENRY C. KELSEY.

(Doc. Hist. Const. U. S. A. 1786-1870, Vol. 2, p. 896.)

(L. N. J. 1871, p. 133.)

(Laws of New Jersey, 1870, p. 67.)

STATE OF NEW JERSEY.

Joint Resolution Number 3,

Ratifying the Amendment to the Constitution of the United States, known as the Fifteenth Amendment.

1. *Be it Resolved by the Senate and General Assembly of the State of New Jersey*, That the Legislature of this State do hereby ratify the Amendment to the Constitution of the United States, proposed at the third session of the Fortieth Congress by resolution of the Senate and House of Representatives

of the United States of America in Congress assembled, to the several legislatures; said amendment being the following words, to-wit:

ARTICLE 15.

* * * *

Approved February 21, 1871.

Concurrent Resolution Ratifying the Proposed Fifteenth Amendment to the Constitution of the United States,

WHEREAS, At the session of the Fortieth Congress, it was resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, two-thirds of both Houses concurring, that the following article shall be proposed to the Legislatures of the several States as an amendment to the Constitution of the United States, which said amendment, when it shall have been ratified by three-fourths of the said Legislatures, shall be valid to all intents and purposes as a part of the said Constitution, namely

ARTICLE 15.

* * * *

Resolved (if the Senate concur), That the said proposed amendment to the Constitution be and the same hereby is ratified by the Legislature of the State of New York.

State of New York.

State of New York.

In Senate, April 14, 1869.

In Assembly, March 17, '69.

The foregoing resolution
was duly passed.

The foregoing resolution
was duly passed.

By order of the Senate,

By order of the Assembly,

JAMES TERWILLIGER,

EDWARD F. UNDERHILL,

Clerk.

Clerk.

(Doc. Hist. Const. U. S. A. 1786-1870, Vol. 2, p. 834.)

Concurrent Resolutions, repealing, rescinding, and annulling the preamble and resolutions of the Legislature of the State of New York, passed April 14, eighteen hundred and sixty-nine, relative to the proposed amendment to the Constitution of the United States.

WHEREAS, At the last session of the Legislature of this State, a preamble and concurrent resolution were adopted in the words and figures following, to-wit:

* * * *

AND WHEREAS, The proposed Fifteenth Amendment above recited has not been ratified by the Legislatures of three-fourths

of the several States, and has not become a part of the Constitution of the United States;

AND WHEREAS, The State of New York, represented in the Legislature here now assembled, desires to withdraw the consent expressed in the above recited concurrent resolution,

Now Therefore, be it Resolved (if the Assembly concur), That the above recited concurrent resolution be and it hereby is, repealed, rescinded, and annulled.

And be it further Resolved (if the Assembly concur), That the Legislature of the State of New York refuses to ratify the above recited proposed Fifteenth Amendment to the Constitution of the United States, and withdraws absolutely any expression of consent heretofore given thereto, or ratification thereof.

And be it further Resolved (if the Assembly concur), That the Governor be requested to transmit a copy of these Resolutions and Preamble to the Secretary of State of the United States at Washington, and to every member of the Senate and House of Representatives of the United States, and the Governors of the several States.

State of New York, In Senate, Jan. 5, 1870. The foregoing resolutions were duly passed. By order of the Senate.

HIRAM CALKINS, *Clerk*.

State of New York, In Assembly, Jan. 5, 1870. The foregoing resolutions were duly passed. By order of the Assembly.

C. W. ARMSTRONG, *Clerk*.

(2 L. N. Y. 70, p. 2147.)

JOINT RESOLUTION.

Rejecting the proposed Fifteenth Constitutional Amendment:

WHEREAS, The General Assembly has received official notification of the passage, by both Houses of the Fortieth Congress of the United States, of the following proposition to amend the Constitution of the United States, in the words following, to-wit:

* * * * *

AND WHEREAS, three-fourths of the Legislatures of the States composing the United States are required to give assent

to the said proposed amendment to the Constitution of the United States before it becomes part thereof, and

WHEREAS, The people of Ohio, by over 50,000 majority have rejected "negro suffrage"; therefore be it

Resolved by the General Assembly of the State of Ohio,
That the Legislature of this State hereby reject the said Fifteenth Article, proposed as an amendment to the Constitution of the United States, and on behalf of the State of Ohio, refuses to ratify the same.

RESOLVED, That the Governor be requested to forward a copy of the foregoing preamble and resolution, properly attested, to the Secretary of State of the United States, our Representatives and Senators in Congress, and the Governors of each of the thirty-seven States in the Union.

F. N. THORNHILL,
Speaker of the House of Representatives.
J. C. LEE,
President of the Senate.

Passed May 4, 1869.

JOINT RESOLUTION.

Relative to an amendment to the Constitution of the United States.

WHEREAS, the General Assembly of the State of Ohio has received official notification of the passage by both Houses of the Fortieth Congress of the United States, at its third session, of the following proposition to amend the Constitution of the United States by a constitutional majority of two-thirds thereof, in the words following, to wit:

* * * * *

AND WHEREAS, Three-fourths of the Legislatures of the States comprising the United States, are required to give assent to the said proposed amendment to the Constitution of the United States before it becomes a part thereof; therefore

Resolved by the General Assembly of the State of Ohio,
That we hereby ratify on behalf of the State of Ohio, the above recited proposed amendment to the Constitution of the United States.

Resolved, That certified copies of the foregoing preamble and resolutions be forwarded by the Governor of Ohio to the President of the United States, to the Presiding Officer of the United States Senate, the Speaker of the United States House

of Representatives, and the Secretary of State of the United States.

A. J. CUNNINGHAM,
Speaker of the House of Representatives.

J. C. LEE,
President of the Senate.

Adopted January 27, 1870.

PROCLAMATION OF SECRETARY OF STATE.

HAMILTON FISH, Secretary of State of the United States.

To all to whom these presents may come, greeting:

Know ye that the Congress of the United States on or about the 27th day of February, 1869, passed a Resolution in the words and figures following, to wit:

A Resolution Proposing an Amendment to the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of both Houses concurring), That the following Article be proposed to the Legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said Legislatures, shall be valid as part of the Constitution, namely:

ARTICLE 15.

* * * * *

And further, that it appears from official documents on file in this Department that the Amendment to the Constitution of the United States proposed as aforesaid has been ratified by the Legislatures of the States of North Carolina, West Virginia, Massachusetts, Wisconsin, Maine, Louisiana, Michigan, South Carolina, Pennsylvania, Arkansas, Connecticut, Florida, Illinois, Indiana, New York, New Hampshire, Nevada, Vermont, Virginia, Alabama, Missouri, Mississippi, Ohio, Iowa, Kansas, Minnesota, Rhode Island, Nebraska, and Texas, in all twenty-nine States.

And further, that the States whose Legislatures have so ratified the said proposed Amendment constitute three-fourths of the whole number of States in the United States.

And further, that it appears from an official document on file in this Department that the Legislature of the State of New York has since passed resolutions claiming to withdraw said

Ratification of the said Amendment which had been made by the Legislature of that State, and of which official notice had been filed in this Department.

And further, that it appears from an official document on file in this Department that the Legislature of Georgia has by resolution ratified the said proposed amendment.

Now therefore, be it known that I, Hamilton Fish, Secretary of State of the United States, by virtue and in pursuance of the second section of the Act of Congress approved the 20th day of April, 1818, entitled, "An Act to provide for the publication of the Laws of the United States and for other purposes", do hereby certify that the Amendment aforesaid has become valid to all intents and purposes as part of the Constitution of the United States.

In testimony whereof, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

Done at the City of Washington this 30th day of March, 1870, and of the Independence of the United States the ninety-fourth.

HAMILTON FISH.

(Vol. Doc. Hist. of Const. U. S. A. 1786-1870 p. 893.)

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

ARTICLE XIII. SEC. 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this Article by appropriate legislation.

ARTICLE XIV. SEC. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the

choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of the State, or the members of the Legislature thereof, is denied to any male inhabitants of such State being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in the Rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SEC. 3. No person shall be a Senator or Representative in Congress, or elector or President or Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken oath as a member of Congress or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

SEC. 4 The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SEC. 5. The Congress shall have power to enforce, by appropriate legislation the provisions of this Article.

ARTICLE 15. SEC. 1. The right of the citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

SEC. 2. The Congress shall have power to enforce this Article by appropriate legislation.



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JAMES H. McKENNEY,
CLERK.

IN THE
SUPREME COURT
OF THE
UNITED STATES

Frank Guinn and J. J. Beal,
Plaintiffs in Error,

vs.

The United States,
Defendant in Error.

No. **96**
~~400~~

BRIEF ON BEHALF OF PLAINTIFFS IN
ERROR.

C. B. STUART, A. C. CRUCE,
W. A. LEDBETTER, NORMAN HASKELL,
C. G. HORNOR,
Attorneys for Plaintiffs in Error.

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IN THE
SUPREME COURT
OF THE
UNITED STATES

Frank Guinn and J. J. Beal,
Plaintiffs in Error,

vs.

The United States,
Defendant in Error.

} No. 923.

BRIEF ON BEHALF OF PLAINTIFFS IN
ERROR.

ARGUMENT ON BEHALF OF PLAINTIFFS
IN ERROR.

I.

THE CONSTITUTIONALITY OF WHAT
IS KNOWN AS THE GRANDFATHER
CLAUSE IN THE OKLAHOMA CONSTITU-
TION, NOT BEING NECESSARILY INVOLVED
IN THE TRIAL IN THE COURT BELOW, AND

THE DETERMINATION OF SUCH CONSTITUTIONALITY NOT BEING NECESSARY TO A FULL SOLUTION OF THE CASE, AS GATHERED FROM THE RECITATIONS OF THE CERTIFICATE OF THE HONORABLE CIRCUIT COURT OF APPEALS, THIS COURT WILL NOT HEAR AND DETERMINE THAT QUESTION.

The Honorable Circuit Court of Appeals for the Eighth Circuit has certified to this Honorable Court two questions for decision in this cause. Both of these questions go to the validity, either in part or in toto, of what is known as the "grandfather" provision in the amendment to the Constitution of the State of Oklahoma.

The question which confronts us at the threshold is whether or not the constitutionality of this provision was involved in the trial in the court below, and was necessary to the determination of the merits of that case. It is our contention now, and it has been our contention since this litigation was instituted on behalf of the United States against these Plaintiffs in Error, that the constitutionality of the grandfather clause was not in issue in the trial court, and we made this

contention both in the trial court, and in the Honorable Circuit Court of Appeals. In the brief filed by us in the Circuit Court of Appeals for the Eighth Circuit, we use this language:

"It must be kept in mind that the defendants in this case were not charged with depriving any voter of his right to vote under color of a state law, nor were they charged with conspiring to enforce an unconstitutional state law. The charge here was simply that they conspired to deprive certain men of certain rights secured by the Constitution of the United States. It is clear, therefore, that the constitutionality of what is known as the grandfather clause in the Constitution of Oklahoma, was not in question in this case, and there was no justification for its injection into the case. If the defendants conspired by force and violence to deprive certain persons of a right secured by the Constitution of the United States they were guilty of an offense against the law, no matter what the means employed by them to enforce and give effect to their conspiracy."

So that we are not now raising for the first time the question that the constitutionality of the grandfather provision is not necessary to a correct determination of the merits of this controversy.

This Honorable Court has time and again declared that it will not pass upon the constitu-

tionality of a law if it presents an abstract question or a moot question, or if a decision upon the constitutionality of the law is not necessary to a correct determination of the case. In *Liverpool, New York & Philadelphia Co. vs. Commissioners of Immigration*, 113 U. S. 39, 28 L. Ed. 901, this Court, speaking through Mr. Justice Matthews, says:

“If on the other hand, we should assume the plaintiff's case to be within the terms of the statute, we should have to deal with it purely as an hypothesis, and pass upon the constitutionality of an act of Congress as an abstract question. That is not the mode in which this Court is accustomed or willing to consider such questions. It has no jurisdiction to pronounce any statute either of the state or of the United States, void because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversy. In the exercise of that jurisdiction it is bound by two rules to which it has rigidly adhered. One, never to anticipate a question of constitutional law in advance of the necessity of deciding it. The other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully.”

Again, in the case of *Missouri, Kansas &*

Texas R. Co. vs. Ferris, 179 U. S. 606, 45 L. Ed. 339, this Court, speaking through Mr. Justice Brewer, says:

“Now, whatever may have been the opinion of the trial court as to the validity of the act of 1897, no matter what may have been said in respect to its validity, if the final ruling was based upon a state of facts which put the act entirely out of the case, it cannot be that we are called upon to consider any expression of opinion concerning it, for such expression was not necessary to the decision. Moot questions require no answer.”

We necessarily deduce from these two opinions, and many others could be cited of the same tenor and effect, that this Court will never pass upon the constitutionality of a constitutional provision of a state of this union, unless the question of its constitutionality is not only clearly raised by the facts of the case, but is necessary to its correct and complete determination.

It is true that the Circuit Court of Appeals for the Eighth Circuit has certified to this Court that the constitutionality of the grandfather provision is involved in this controversy. The language of the Honorable Circuit Court is as follows:

“And the Circuit Court of Appeals for

the Eighth Circuit further certifies that the following questions of law are presented to it in the case above entitled. That a decision of each of these questions is indispensable to a determination of the cause; and that to the end that the cause may be properly determined and disposed of, and decided, the instruction of the Supreme Court of the United States, upon these questions, to-wit: 'The constitutionality of the grandfather clause' is asked."

Our respect for the Circuit Court of Appeals of the Eighth Circuit, and our high regard for the ability of its judges, make us hesitate to join issue with that Court upon this proposition. We do not understand that the certificate of the Circuit Court of Appeals that the judgment of this Court upon the constitutionality of a law is necessary to the determination of a given case is binding up this Court. In our judgment, this Court will look to the record in this class of cases as in cases coming by error from the highest courts of the state, to determine; first, whether a constitutional question is involved; and, second, whether it is necessary to a complete determination of the cause. It is not necessary, we think, to have the whole record now lodged in the Circuit Court of Appeals brought to this Court in order

to determine the question now under consideration.

The certificate of the Honorable Circuit Court of Appeals is full enough in itself, and contains a statement of facts from which this Court can reach a correct conclusion. The certificate sets out that the defendants were indicted in the trial court for conspiracy to injure, oppress and intimidate on account of their race, and color, certain negro citizens named in the indictment, who were electors qualified to vote for members of Congress, and that this indictment was predicated upon Section 5508 of the Rev. Statutes of the United States, now Section 19 of the Penal Code. The certificate further discloses that the defendants were members of the election board of the precinct in which the negro citizens named in the indictment resided, and were discharging their functions as state officers at the time the alleged wrong was said to have been committed.

Now, Section 19 of the Penal Code is as follows:

“If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any

right or privilege secured to him by the Constitution and laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highways, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than Five Thousand Dollars, and imprisonment not more than ten years, and shall moreover, be thereafter ineligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States."

It will be seen that this statute contemplates a naked conspiracy separate and distinct from the means employed to effectuate that conspiracy. If two or more persons conspire together to deprive any citizen of the United States of the rights secured by the laws of the United States, it is the corrupt agreement, the intent to do the wrong, that is the gist of the offense; and the law does not concern itself with the means employed to commit the offense. If two or more persons conspire to prevent a citizen of the United States from casting his ballot for a member of Congress, and in order to effectuate that conspiracy, they put the citizen under some physical disability, so as to prevent him from going to the polls it is not the method used to bring about such disability

which the law makes a crime, but it is the corrupt mind looking to the deprivation of the right secured by the Constitution which the law considers and condemns.

The Court will bear in mind that this is not a charge predicated upon Section 20 of the Penal Code. That section declares:

“That any person who, under color of any law, statute, ordinance, regulation or custom, wilfully deprives any citizen of his rights, privileges or immunities secured or protected by the Constitution and laws of the United States, is guilty of an offense against such laws.”

Clearly, therefore, (if Section 20 applies to suffrage at all), and these defendants were indicted under such Section, then the constitutionality of the state law which they were attempting to enforce might be called in question; because there the offense would consist in depriving a citizen of his constitutional rights under and by virtue of an unconstitutional law. It is not charged in the bill of indictment in this case, and the Court will assume, we think, that it was not necessary to charge it in order to make a valid indictment, that the defendants corruptly conspired to deprive certain negroes of the right to vote at a congress-

sional election by the enforcement of what is known as the grandfather clause; but they are charged simply with the naked conspiracy to intimidate and oppress and to deprive certain negroes of the right to vote regardless of the means adopted by the defendants to effect that purpose.

It occurs to us, therefore, that whether the grandfather clause is constitutional or unconstitutional, the defendants were guilty if they together agreed and conspired to deprive certain citizens of their right to vote at a congressional election. Of course, this Court can see at a glance that if the proof in the case below had developed that the defendants had conspired to deprive certain citizens of the right to vote by the enforcement of the grandfather clause, and such clause were constitutional, and the defendants did no more than enforce such clause in the election precinct where they presided as officers, they committed no offense against the law, and even if such grandfather clause were in fact, unconstitutional, the defendants, if they did no more than enforce the grandfather clause at such election, would not be guilty, unless they knew or believed such clause to be unconstitutional. It thus ap-

pears, it seems to us, that in order to sustain a conviction against the defendants they must have enforced the grandfather clause oppressively, and with an effort at intimidation, or they must have gone beyond the terms of the grandfather clause in passing upon the qualifications of electors offering to vote. But in either of the cases just presented, the real gist of the offense would be the corrupt agreement to do the unlawful act, and not the means adopted. So that the defendants in the court below could have been acquitted or convicted without reference to the constitutionality of the provision now under consideration.

But there is another phase of this matter which, in our judgment, precludes the necessity and propriety of passing upon the validity of this constitutional provision. The grandfather clause was a part of the Constitution of the State of Oklahoma. Its officers were in duty bound to enforce such law. We understand that it is fairly settled by the decisions of this Court, and the decisions of the various states of this union, including the State of Oklahoma, whose judicial pronouncement upon this question would be binding upon these defendants, that an executive officer

has no right to refuse to enforce a law of his state, because he believes such law to be unconstitutional. This precise point was determined by the Supreme Court of Oklahoma, in the case of State, ex rel. Cruce, Governor vs. Cease, 114 Pac. 251. In that case the Court said:

“We think the Louisiana doctrine is sound. It is elementary that statutes are presumed by the courts to be constitutional until the contrary is made to appear beyond a reasonable doubt. Courts are the proper tribunals to pass upon such questions, and if they exercise such caution before declaring the statute void, nothing would justify mere ministerial officers who have no judicial power to assume that the statute is unconstitutional and proceed to act in contravention of it.”

The Court cited as one of the authorities which impelled it to reach this conclusion, the case of Braxton Co. Court vs. West Va., 208 U. S. 192, 52 L. Ed. 450. In that case, Mr. Justice Brewer said:

“It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their non-performance was equally so. He was testing the constitutionality of the law purely in the interest of third persons, namely, the tax-payers, and

in this particular the case is analagous to that of Caffrey vs. Oklahoma, 177 U. S. 346. We think the interest of an appellant in this court should be personal, and not official, and that the defendant having sought the advice of the courts of his own state, in his official capacity, should be content to abide by their decision."

The Supreme Court of Louisiana, in State ex rel. New Orleans, Canal Co. vs. Heard, 47 La. Ann. 1679, says:

"Laws are presumed to be and must be acted upon by subordinate executive functionaries, as constitutional and legal, until their unconstitutionality or illegality has been judicially established."

This case seems to have been fully annotated in 47 L. R. A. at page 512, and the annotator, after reviewing all the decisions upon the subject, concludes as follows:

"Upon the question of the right to ignore the statutes some decisions agree with the Nebraska Court, but the trend of judicial thought appears to be with the Louisiana doctrine."

But whatever may be the weight of authority and the better reasoning, the opinion of the Supreme Court of Oklahoma, that an executive officer, charged with the enforcement of a state law cannot question the validity of such law

has been held by this Honorable Court to be binding as presenting a *local* question pure and simple. In the case of *Smith vs. Indiana*, 191 U. S. 139, 48 L. Ed. 125, Mr. Justice Brown delivering the opinion of the court, said:

“We have no doubt of the power of state courts to assume jurisdiction of the case if they chose to do so. Although there are many authorities to the effect that a ministerial officer charged by law with the duty of enforcing a certain statute cannot refuse to perform his plain duty thereunder upon the ground that in his opinion, it is repugnant to the Constitution, it is but just to say, however, that the power of a public officer to question the constitutionality of a statute as an excuse for refusing to enforce it, has often been assumed and sometimes directly decided to exist. In any event it is a purely *local* question, and seems to have been treated so by this Court in *Huntington vs. Worthen*, 120 U. S. 97, 30 L. Ed. 881.”

This decision by Mr. Justice Brown is founded in the highest wisdom, because, were not this the true rule, an election officer might be placed between two hostile jurisdictions, and be unable, whatever his action with reference to the enforcement of the law, to escape punishment. In the case of *State, ex rel. Cruce, Governor, vs. Cease*, *supra*, it was held that the election officer

could be mandamusd to enforce a law, although he thought it unconstitutional, and failure on his part to obey the mandate of the court, would necessarily result in punishment. On the other hand, if he did enforce the law in obedience to the mandate of his own courts whose judgment he must respect, if the law were in fact, unconstitutional, then he would be held to answer to the Federal Court, and would be prosecuted for the enforcement of an unconstitutional law, which deprives some citizen of the United States of a constitutional right. The Court wisely said, therefore, that this question must in its very nature and essence, be local; because otherwise, the election officer might be placed between two fires, and unless he remained absolutely passive, he would be injured either on the one side or the other.

If the constitutionality of the grandfather clause was involved in the trial in the court below it must have been because the defendants conspired to enforce that law, and actually did enforce it.

Another consideration which, in our judgment, eliminates from this case the constitutionality of the question presented, is the plea of good

faith interposed by the defendants in the execution of this law. The Supreme Court of the State of Oklahoma in the case of Atwater vs. Hassett, 111 Pac. 802, had, prior to the election in question, distinctly held that the grandfather clause of the Oklahoma Constitution was valid. If the defendants, in good faith, relied upon such decision and did no more than execute the law it would have been a complete defense to the charge preferred against them, even though the law thereafter should be declared unconstitutional by the highest tribunal of this union. If an election officer enforces the law of his state in good faith it is utterly immaterial whether the law be constitutional or unconstitutional; because you cannot impute a criminal intent to a public officer for the enforcement of a statute of his own state.

Mr. Bishop, in his work on Statutory Crimes, touching upon the duties and obligations of election officers, Sections 805-806, uses this language:

“Knowledge of the law is not conclusively imputed to election officers. So that if, acting carefully and conscientiously they do what is contrary to their duty through mistake either of law or fact, they are exempt from indictment.”

“Though the statutes of our states differ, and the duties imposed on these officers are diverse to a large extent, they are deemed judicial or *quasi* such, a ground largely exempting them from criminal or even civil liability for their mistakes. Of this sort is the passing upon the qualifications of voters. Whether in making out or revising voting lists, or receiving or rejecting votes at the polls. Therefore, for example, the presiding officer at an election is not criminally liable for any mistake which he may honestly make in receiving or refusing to receive a vote.”

The text is fully supported by the cases of *Burn vs. State*, 12 Wis. 519; *State vs. Daniels*, 44 New Ham. 383; *Bevard vs. Hoffman*, 18 Md. 479. Chief Justice Dixon, in the Wisconsin case above cited, said:

“In passing upon this charge the plaintiffs in error were acting in an official and *quasi* judicial capacity, and were bound to determine the law as well as the facts. They were obliged by law to act and decide upon the qualifications of every person offering as a duly qualified elector to vote at the polls at which they presided. When those qualifications were, by some proper method, called in question, and when, so acting, the most that reason or justice could require of them was a bona fide effort to discharge the duties according to the best of their knowledge and ability, and if in so doing they committed an obvious but sincere mistake of law or error

of judgment, they are not criminally responsible therefor. The law only requires of them direct candor and sincerity, and it would only punish them for corruptness and falsehood, acting contrary to their sense of duty and the dictates of their own consciences. It is the wicked intent or corrupt knowledge which the law punishes as a crime, and it cannot be supposed that it was the intention of the legislature to substitute for them the upright but misdirected efforts of the mind or judgment of one whose action was not voluntary, but in obedience to the requirements of the law. The maxim that ignorance of the law will not excuse could only be applied to this case so far as to prevent the plaintiffs in error from setting up their ignorance of the penalties inflicted by the law as an excuse for the wilfull violation of the duties which it imposed upon them."

This Court, therefore, can see from an inspection of the certificate lodged here by the Honorable Circuit Court of Appeals, that if the enforcement of the grandfather clause was a necessary ingredient in the offense charged against the defendants in the court below, the defense interposed would necessarily be, either that the election officers believed the law to be constitutional although it might not be so, or that regardless of its constitutionality, they were compelled under the decisions of our own state to enforce

the election law under consideration without question as to its constitutionality. If they were compelled to enforce the law regardless of its validity because as officers of their state they could not question such validity, then the constitutionality of the clause under consideration could not have been in question at the trial. And further, if they enforced such law believing it to be constitutional, then the actual constitutionality of the law was still not in question.

We, therefore, conclude that the validity of the grandfather clause is not necessary to the determination of this controversy, and that the injection of its constitutionality into the case by the judge of the court below was unauthorized and unsupported either by the nature of the offense charged under Section 19, or by the facts of the case as shown by the face of the Court's certificate.

II.

IF, HOWEVER, THIS HONORABLE COURT SHOULD HOLD THAT A CONSIDERATION OF THE VALIDITY OF THE GRANDFATHER CLAUSE AFORESAID IS INVOLVED IN THIS CONTROVERSY AND

NECESSARY TO ITS COMPLETE DETERMINATION, THEN WE PROCEED TO CONSIDER THE TWO QUESTIONS PROPOUNDED BY THE CIRCUIT COURT OF APPEALS, WHICH ARE AS FOLLOWS:

"1. Was the amendment to the Constitution of Oklahoma heretofore set forth valid?

2. Was that amendment void in so far as it attempted to debar from the right or privilege of voting for a qualified candidate for a member of Congress in Oklahoma, unless they were able to read and write any section of the Constitution of Oklahoma, negro citizens of the United States who were otherwise qualified to vote for a qualified candidate for a member of Congress in that State, but who were not, and none of whose lineal ancestors was, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, because they were then slaves?"

It seems to be clear from these questions that the Circuit Court of Appeals asks that the grandfather clause be considered in two aspects. First: Whether it is constitutional as a whole; and, second: Whether it is constitutional as to that portion of the law which creates an exemption in favor of those whose ancestors could vote under any form of government prior to 1866.

In the discussion of this matter in the trial court, and more particularly in the Circuit Court of Appeals, it was contended that this grandfather clause was invalid when measured and tested either by the 14th or the 15th amendments to the Constitution of the United States. It becomes necessary, therefore, to consider this constitutional provision of the State of Oklahoma with reference to both amendments; because we assume that like contentions will be made here as were made in the courts below.

It may be well, therefore, at the outset, briefly to consider the nature of suffrage; its origin; the character of the right; by what power granted under our system of government, and by what power qualified or restricted.

THE NATURE OF SUFFRAGE.

Restricted suffrage is the only character of suffrage which has existed in the states of this union from the beginning of the government. Whatever may be the merit of universal suffrage; however strong may have been some of its advocates, it has never found recognition or lodgment in the American system. Suffrage is purely a

political right, granted by the sovereign to those who are thought to be worthy and competent to take a part in the management and functions of government. In the nature of things it can be neither a natural nor a fundamental right. Mr. Jameson, in his work on Constitutional Conventions, Section 336, says:

“Which then is the true theory of suffrage? Is its exercise that of a natural right, or is it merely the performance of a duty resting simply upon positive law? The answer to this question can be based only upon presumptions, and judging by them, suffrage is not a natural right. In the first place, there is the presumption arising from the fact that no political community has ever existed in which the right to vote has been conceded to be the natural right of all the citizens. I mean, conceded not as a matter of speculation, but as one of practical administration. This is believed to be true in the ancient democracies, as it has been in those modern governments in which circumstances have enabled their founders to carry into effect most perfectly the theory of equal rights.”

Under our theory of government it has always been conceded, both in the abstract and in practical application, that the right to vote was a political right, given or denied by the states of this union as in the judgment of the majority

seemed wisest and best. No such thing as a national voter in the strict sense of that term has ever been known in our system. The very fact that the qualifications of voters in the states of this union are not uniform, and that in one state a citizen is permitted to vote, when in another state that right would be denied to a citizen in exactly similar conditions, demonstrates as a practical proposition that the right to vote is a right granted by the sovereign state, and that a denial of that right, unless such denial impinges upon the Constitution of the United States, constitutes no invasion of natural or fundamental rights of a citizen of the United States.

In other words, under the American theory and practice of government, the right to vote in the states comes exclusively from the states, and the right to vote which was intended to be protected by the constitutional amendment is the right to vote as established by the laws and constitutions of the states. If this be true, then we must approach a consideration of the constitutionality of the law in question with the idea constantly in view that there is no natural or fundamental right in any citizen of the United States to

vote anywhere, at any place, or at any election.

SUFFRAGE IN THE STATES OF
THE AMERICAN UNION IS NOT CONTROLL-
ED OR AFFECTED BY THE FOURTEENTH
AMENDMENT TO THE, CONSTITUTION OF
THE UNITED STATES.

This great amendment has been the subject of much debate and has, of course, been the subject of frequent consideration by this Court. It was made necessary by the results of the unfortunate war between the states. Those who advocated on the floor of Congress the passage of the Fourteenth Amendment and its submission to the states for ratification did not clearly understand its full purport, nor did they know the exact limitations which that amendment placed upon the power of the states. There were, at the time, some wise and cautious men who thought that this amendment, in its wide scope and sweep, would result in a practical destruction of the autonomy of the states, and would have the effect to destroy the constitutional relations theretofore existing between the states and the federal government. Not until the celebrated opinion in the Slaughter House Cases, 16 Wall. 36, 21 L. Ed.

394, did the Court attempt to define the purpose, scope and effect of this great constitutional amendment. In those cases this Court declared that the amendment conferred no new rights, but that it was concerned solely with those privileges and rights and immunities which were possessed by citizens of the United States prior to the amendment, those rights which inhered in our system of government, and which were fundamental in their character. Mr. Justice Miller, in the 21st L. Ed., page 408, uses this language:

“Of the privileges and immunities of the citizens of the United States, and of the privileges of the citizen of the state, and what they respectively are, we will presently consider. But we wish to state here, that it is only the former which are placed by this clause under the protection of the federal constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment. If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizens of the state as such, the latter must rest for their security and protection where they have heretofore rested, for they are not embraced by this paragraph of the amendment.”

Again, in the same case, Mr. Justice Mil-

ler, quoted with approval the language of Mr. Justice Washington, in the case of *Coffield vs. Coryell*, 4 Wash. C. C. 371:

“The inquiry is what are the privileges and immunities of citizens of the several states. We feel no hesitancy in confining these expressions to those privileges and immunities which are fundamental, which belong of right to the citizen of all free governments, and which have at all times been enjoyed by citizens of the several states, which compose this union, from the time of their beginning, free, independent and sovereign.”

Again Justice Miller says:

“Was it the purpose of the Fourteenth Amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned from the states to the federal government?”

The learned Justice thereafter answers this question in the negative. The net result of this decision, which in this regard has never been reversed or modified by this Court, is: That the Fourteenth Amendment confers the rights of citizenship on every person born or naturalized in the United States, if he is subject to its jurisdiction, and that the primary cause of the passage of the

amendment was to protect negroes in the United States who had recently been emancipated; that the amendment is intended to protect only those privileges and immunities which flow from national citizenship and which are not dependent upon state citizenship. That is to say: Those fundamental rights of a citizen of the United States derived from the federal constitution, statutes or treaties, given or granted by the federal government. If, in a given case under national law, a citizen of the United States has a right or a privilege whether fundamental or given by positive federal law, it is a privilege under the Fourteenth Amendment, and the right to be protected in the same is an immunity under the same amendment. In applying this principle, therefore, to the case at bar, we are to determine: First. Whether suffrage is a privilege and immunity to which a citizen of the United States is entitled under and by virtue of his federal citizenship.

One of the first and most instructive cases touching the question now under consideration is that of *Minor vs. Happersett*, 21 Wall. 162, 22 L. Ed. 629. This case has been cited time

and again with distinct approval by this Court. Speaking of the Fourteenth Amendment, Chief Justice Waite, who delivered the opinion, declared:

“If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the Constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States as amended, and consequently void. The direct question is therefore presented, whether all citizens are necessarily voters. The constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are, but only whether suffrage is necessarily one of them. It certainly is nowhere made so in express terms. The United States had no voters in the states of its own creation. The elective officers of the United States are all elected directly or indirectly by state voters. The members of the House of Representatives are to be chosen by the people of the states, and the electors in each state must have the qualifications requisite for electors of the most numerous branch of the state legislature. The amendment did not add to the privileges and immunities of a citizen. It simply furnishes an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. * * * It is clear, therefore, we think, that the constitution has not added the right of suffrage to the privileges

and immunities of citizens as they existed at the time it was adopted."

In this case the contention was made that under the Fourteenth Amendment a woman who was a citizen of the United States and of the State of Missouri, and who was debarred the right of suffrage in that state, was protected by the Fourteenth Amendment. The Court declared in substance that suffrage was not co-extensive with the citizenship of the states at the time of the adoption of the amendment, and that it was not the intention of the amendment to make all citizens of the United States voters. That the exclusion of women from the right of suffrage did not make the state government unrepresentative in form, within the meaning of the guaranty in that behalf contained in the United States Constitution.

This case and the subsequent cases reaffirming the doctrine announced by a unanimous court, establish beyond controversy that the right to vote is not an incident to national citizenship; that there is no such thing in the abstract as a federal right of suffrage. It follows, therefore, that suffrage being a matter *reserved* to and con-

trolled *entirely* by the states, is not, and never was, a federal right, and that its denial or abridgment never was intended to be protected by the privileges and immunities clause of the Fourteenth Amendment. This is the view not only taken by this Court, but the view taken by the learned text writers.

Judge Brannon, in his excellent work on the Fourteenth Amendment, page 77, says:

“If, therefore, state constitutions or laws make color a qualification of voting, it violates a privilege or immunity given the colored man. It violates Amendment Fifteen, and the state officers of elections would be bound to ignore the state law, as the amendment of its own force without legislation strikes the word white from the state constitutions. It would be a denial of a right given by Amendment Fifteen, but as properly held in *United States vs. Reese*, it would not come under the Fourteenth Amendment. It is not a privilege under Amendment Fourteen. It does not need that amendment for its maintenance. If the state definition of suffrage happen to deny suffrage to a colored man for any substantial ground not merely colorable, other than race, color or previous condition of servitude, it violates no privilege or immunity given by the federal constitution. The case of *Reese vs. U. S.*, 92 U. S. 214, announces this doctrine without limitation or equivocation.”

Mr. Justice Miller, in his "Lectures on the Constitution of the United States," Bancroft Davis Edition, page 661, says:

"The right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the Fourteenth Amendment. That amendment does not add to these privileges and immunities.

* * * Neither the Constitution nor the Fourteenth Amendment made all citizens voters."

The learned justice thereby recognizes as undisputed law that suffrage is not and never was a federal right and therefore not a federal privilege or immunity. This view is sustained by all the text writers and commentators upon the Constitution, and we crave the pardon of the Court for the time we have consumed in presenting this proposition, which, to our minds, has been so long settled as to permit of no further question or debate. Inasmuch as it was urged in the court below, and we cannot anticipate what may be urged here, we have felt it necessary to make the foregoing suggestions.

It was strenuously contended also by the government in this case that suffrage is one of the

rights covered and guaranteed by the clause of the Fourteenth Amendment with reference to the equal protection of the laws. This presents a question of more seriousness, and yet in view of the adjudicated cases, we do not think it difficult of solution.

As already urged, the right to vote is a political right or privilege and such right can only be granted by the states. Prof. Willoughby, in his admirable work on the Constitution, Volume 2, page 483, says:

“The requirement of equal protection of the law does not operate to prevent the states from restricting the enjoyment of political privileges to such classes of its citizens as they may see fit.”

This Court has time and again held that the right to hold office in a state was purely a political right, and not within the protection of the Fourteenth Amendment. It will be remembered that the Fourteenth Amendment, while acknowledging the right of a state to place such limitations upon suffrage as it saw fit, provides that when the right to vote at an election for President or Vice-President or Representative in Congress is denied to male inhabitants of the

state 21 years of age, and citizens of the United States, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens bear to the whole number of male citizens 21 years of age in such state. This language clearly implies that no limitation upon the right or grant of suffrage was placed by any provision of the Fourteenth Amendment upon the states. But if such suffrage right was denied for other than the purposes named in the amendment, there was a reduction of the basis of representation. Professor Willoughby, in Volume 1, page 534, of his work, says:

“This amendment thus leaves it within the constitutional power of the states to place such restrictions as they may choose upon the exercise of the suffrage within their limits, but subject to a reduction of the number of representatives to which they are entitled in Congress, to the extent to which the right to vote is denied to adult male inhabitants, citizens of the United States. The Fifteenth Amendment, adopted two years later, placed the absolute prohibition upon the states, that the right of citizens of the United States to vote shall not be denied or abridged on account of race, color or previous condition of servitude. It seems to be clear, therefore, that limitations upon suffrage by the states,

no matter in what form, enacted, asserted, or practiced, was not within the purview of the Fourteenth Amendment."

Mr. Blaine, in his celebrated work entitled "Twenty Years in Congress," declared that under the Fourteenth Amendment the states of this union could absolutely have disfranchised the negro, and that it is only the Fifteenth Amendment which protects. No man understood better than Mr. Blaine the causes which led to the passage of the Fourteenth Amendment, nor the rights and privileges which it was intended to protect.

In *Minor vs. Happersett, supra*, Chief Justice Waite, following this line of thought, on page 630, said:

"And still again. After the adoption of the Fourteenth Amendment, it was deemed necessary to adopt the Fifteenth. The Fourteenth Amendment had already provided that no state should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the constitution to prevent its being denied on account of race, etc.? Nothing is more evident than that the greater must include the less; and if all were already protected, why go through with the form of amending the constitution to protect a part?"

If, in the *Minor vs. Happersett* case, the right of suffrage had been protected by the equal protection clause of the Fourteenth Amendment the Court would have so declared. No case has yet been decided by this Court in which it is held that a denial or abridgement of suffrage is within any clause of the Fourteenth Amendment. If any provision of that Amendment protected against a denial or abridgement of suffrage, the Fifteenth Amendment would have been unnecessary.

Mr. Woodrow Wilson, in his *History of the American People*, Volume 5, with that clearness and virility which is characteristic of all his utterances, uses this language:

“Congress did not wait for Gen. Grant’s inauguration, however, to go forward with its policy of reconstruction. Before the end of February, 1869, it proposed to the states a Fifteenth Amendment, intended to lay in the constitution itself the foundations of negro suffrage, *which as yet had only the support of the reconstruction acts of 1867, which were mere statutes.* ‘The rights of citizens of the United States to vote,’ so ran its terms, ‘shall not be denied or abridged by the United States or any state, on account of race, color or previous condition of servitude.’ New Jersey, Delaware, Maryland, Kentucky, California, and Oregon, rejected it. Tennessee did

not act upon it, but thirty of the thirty-seven states accepted it, and it became a part of the Constitution. Virginia, Georgia, Mississippi and Texas had not yet been reconstructed to the satisfaction of Congress. The acceptance of this new amendment accordingly, the enactment in perpetuity of the reconstruction act, was made a condition precedent to their readmission to Congress, as the acceptance of the Thirteenth Amendment, which gave the negroes their freedom and of the Fourteenth Amendment, which made them citizens of the United States and of the states of their residence had been. This, too, was to be a part of the hard driven bargain of reconstruction before the republican leaders would be satisfied. The dominance of the negroes in the south was to be made a principle of the very constitution of the union."

The learned author in substance, therefore, declared that the foundations of negro suffrage were not laid anywhere in the Fourteenth Amendment. That the suffrage which had been granted to the negro under the reconstruction acts of 1867 was supplemented and made legal, not by the Fourteenth, but by the Fifteenth Amendment.

It would appear that the Congress of the United States had no real constitutional authority to grant the right of suffrage as it did do by congressional enactment, to negroes in any state

where that suffrage was denied by the laws of that state. In order to bring this suffrage within the protection of the federal government it was necessary to amend the constitution with the consent of the states, and it was thus that the Fifteenth, and not the Fourteenth Amendment, was adopted for this purpose. We take it, therefore, that inasmuch as suffrage is purely a political right, granted by the state, and not by the federal government, and that its exercise in the states of this union by the negro was protected and was intended to be protected by the Fifteenth and not the Fourteenth Amendment to the Constitution that such suffrage is not within ^{or} either the privileges and immunities clause ~~for~~ the equal protection clause of such Fourteenth Amendment.

It is true that in the case of *Strauder vs. State of West Va.*, 100 U. S. 303, 25 L. Ed. 664, Mr. Justice Strong held that the statute of West Virginia, which singles out and denies to colored citizens the right and privilege of the law as jurors because of their color, was a discrimination against that race forbidden by the Fourteenth Amendment. In that case, Mr. Justice Field and Mr. Justice Clifford dissented. The majority

opinion was based upon the proposition that the right of trial by jury and to be tried by a jury of peers was a fundamental right, inhering in the very structure of our system of government.

Mr. Justice Strong, delivering the majority opinion, on page 666, says:

“The right to a trial by jury is guaranteed to every citizen of West Virginia by the constitution of that state, and the constitution is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine. That is: All his neighbors, fellows, associates, persons, having the same legal status in society as that which he holds. Blackstone in his Commentaries says: ‘The right of trial by jury or the country is a trial by the peers of every Englishman and is the great bulwark of his liberties, and is secured to him by the Great Charter.’ ”

It seems clear, therefore that this decision was based upon the proposition that a right of trial by a jury of peers is a fundamental right inherited from our English forbears, and not a political right such as the right of suffrage or the right to hold office.

III.

IS THE GRANDFATHER CLAUSE UNDER CONSIDERATION IN VIOLATION OF THE FIFTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

At the outset it may be well to examine the purpose and scope of the Fifteenth Amendment as explained and defined by the adjudications of this Court.

One of the first cases to construe this amendment was that of *United States vs. Reese*, 92 U. S. 214, 23 L. Ed. 563. The decision in this case was rendered by Mr. Chief Justice Waite, who rendered the decision in the case of *Minor vs. Happersett*, *supra*. We quote from page 564 of his opinion:

"The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the states or the United States, however, from giving preference in this particular to one citizen of the United States over another on account of race, color, or previous condition or servitude. Before its adoption this could be done. It was as much within the power of a state to exclude citizens of the United States from voting on account

of race, etc., as it was on account of age, property or education. Now it is not."

In *United States vs. Cruickshank*, 92 U. S. 542, 23 L. Ed. 588. it is said, in substance, that the right of suffrage was not a necessary attribute or incident of national citizenship, but exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the states comes from the states, but the right of exemption from prohibited discrimination comes from the United States. The former has not been granted or secured by the Constitution of the United States, but the latter has.

From these decisions and others of a kindred nature decided by this Court, it is clear that there is no such thing as a national or federal right to vote. The right to vote must come from the states, and not from the federal government. The sole purpose of that amendment is to prevent the state from discrimination and that discrimination must be based upon race, color, or previous condition of servitude. Every state has the right in its own way to purge its electorate, and to give suffrage to those citizens which in its judgment are best qualified to administer government. This

right is absolute, except as prevented by the foregoing clause of the Fifteenth Amendment. Mr. Justice Hunt, in the case of *United States vs. Anthony*. 11 Blatchford 205, said:

"The right of voting or the privilege of voting is a right or privilege arising under the constitution of the state, and not under the constitution of the United States. The qualifications are different in the different states. Citizenship, age, sex, residence are variously required in the different states, or may be so required. If the right belongs to any particular person it is because such person is entitled to it by the laws of the state where he offers to exercise it, and not because of citizenship of the United States. If the state of New York should provide that no person should vote until he had reached the age of 30 years, or after he had reached the age of 50 years, or that no person having gray hair or who had not the use of all his limbs should be entitled to vote, I do not see how it could be held to be a violation of any right derived or held under the constitution of the United States. We might say that such regulations were unjust, tyrannical, unfit for the regulation of any independent state, but if rights of a citizen are thereby violated, they are of that fundamental class derived from his position as a citizen of a state, not those limited rights belonging to him as a citizen of the United States."

An educational qualification; a property qualification; a qualification of good moral char-

acter; all are lawful qualifications, and within the power of the state to impose. Every state and country is necessarily much concerned about the character of men to whom it shall commit the right of suffrage. It is through this right that government is preserved, and it is through this right that the agencies of government are created. It, therefore is of the highest moment that the men clothed with this great right should be those who are loyal, who are competent to understand the nature and functions of government, and who are of such moral stamina as to justify the belief that they will exercise the right granted, firmly, prudently and wisely. There is, therefore, no longer debate that restrictions upon suffrage, under our theory of government, are necessary to the continuance and perpetuity of our free institutions.

All writers and commentators on our constitutional form of government recognize this to be true, and therefore, when we come to consider whether the grandfather clause of the State of Oklahoma is in violation of the Fifteenth Amendment to the Constitution of the United States, it must be kept in mind at all times, that limita-

tion upon suffrage is at some times, and at some places, both wise and just and clearly within the reserved powers of the States.

Practically all the states of the Union at the time of the adoption of the American Constitution had imposed some character of restriction or qualification upon the right of suffrage. At that time, New Hampshire excluded paupers. Massachusetts limited the right to those having a freehold estate within the Commonwealth. Rhode Island provided that voters should be mature in years, of quiet and peaceable behaviour and civil conversation, and should possess property. New York had a property qualification; as did New Jersey, Virginia, Maryland and North Carolina. Of course, these constitutions have been since changed or modified, but the fact remains that in each and every state of this union various restrictions have been placed upon the right of suffrage, and the validity of these restrictions placed as they have been upon voters from the very beginning of the government, has never yet been seriously questioned.

The question, therefore, to be considered here is, not whether restrictions have been placed

upon the colored voter, by the constitutional amendment in the State of Oklahoma, but whether these restrictions have been so placed on account of race, color, or previous condition of servitude.

And this brings us to a consideration of certain rules and canons of construction which this Court has pronounced and adopted for the purpose of determining the meaning and scope of statutes alleged to be within the prohibition of the Fifteenth Amendment on account of race, color, etc. The cases upon this subject are few, but we think that we shall be able to deduce from these few cases certain rules of construction by which the validity of the constitutional amendment now in question may be determined.

Among the first cases which announced a rule of construction in matters of this character was that of *Mills vs. Green*, decided by Circuit Judge Goff, and reported in 67 Fed. Rep. 818. In that case suit was brought by a citizen of the United States against the supervisor of registration of a state to restrain him from carrying out the provisions of certain state statutes on the ground that they violated the Constitution of the state and of the United States. Judge Goff

sustained this right, holding that the state statute was in contravention of both the Fourteenth and Fifteenth Amendments to the Constitution of the United States. This decision came to be reviewed later, by Mr. Justice Fuller on the circuit, and his decision is reported in *Mills vs. Green*, 69 Fed. Rep. 852. Mr. Justice Fuller held that a court of equity had no jurisdiction of the subject matter involved in that case; that as the object of the suit was to restrain the operation of the state government for the assertion and vindication of a political right to be an elector it was not within the province of equity jurisprudence. But the learned Justice remarks significantly in passing, that even if the court had jurisdiction, the state statute in question *did not appear on its face to discriminate against the negro on account of race, color, etc.* This seems to be the test later applied by the Supreme Court of the United States in *Williams vs. Mississippi*, 170 U. S. 214, 42 L. Ed. 1012. In this case Mr. Justice McKenna, who delivered the opinion, distinguished the case of *Yick Wo vs. Hopkins*, 118 U. S. 356. The learned Justice says:

“The constitution (meaning of Missis-

issippi) provides for the payment of a poll tax and by a section quoted, its payment cannot be compelled by seizure and sale of the property. We gather from the brief of counsel that its payment is a condition of the right to vote, and in a case to test whether its payment was or was not optional the Supreme Court of the State said: "Within the field of permissible action under the limitations imposed by the federal constitution, the Convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, or temper and of character which clearly distinguished it as a race from that of the whites. A patient, docile people, but careless, landless and migratory within narrow limits. Without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the federal constitution from discriminating against the negro race, the Convention discriminated against its characteristics, and the offenses to which its weaker members were prone."

But Mr. Justice McKenna said:

"Nothing tangible can be deduced from this. If weakness were to be taken advantage of, it was to be done within the field of permissible action under the limitations imposed by the federal constitution; and the means of it were the alleged characteristics of the negro race; not the administration of the law by the officers of the state. *Besides, the*

operation of the constitution and laws is not limited by its language or effects to one race. They reach vicious and weak white men as well as weak and vicious black men. And whatever is sinister in their intention, if anything, can be prevented by both races by the exertion of that duty which voluntarily pays taxes and refrains from crime."

In concluding the opinion the learned Justice, referring to the opinion in *Yick Wo vs. Hopkins*, *supra*, said:

"This comment is not applicable to the constitution of Mississippi and its statutes. They do not, on their face, discriminate between the races; and it has not been shown that the actual administration was evil. Only that evil was possible under them."

The learned Justice further, in that case, held that the denial of rights protected by the Fourteenth and Fifteenth Amendments must be such denials as are the result of the constitution and laws of a state, and not of the administration of those laws.

In *Pope vs. Williams*, 193 U. S. 621, 48 L. Ed. 817, Mr. Justice Peckham, in delivering the opinion of the Court, held that the Maryland law of suffrage did not, on its face, discriminate within the meaning of either the Fourteenth or Fifteenth Amendments to the Constitution.

Another rule of construction which this Court has announced is that the meaning of a suffrage statute cannot be tested either by the utterances of those who were instrumental in passing it nor by the wisdom or unwisdom of the law. The intent of a legislative act can be gathered from its language only. The legislature is responsible only for its collective acts embodied in laws, and not at all for the views of individual members. This doctrine was announced in *Fletcher vs. Peck*, 6 Cranch 87; *Dodge vs. Woolsey*, 18 How. 371; and *United States vs. Des Moines*, 142 U. S. 545.

To state the matter in another way, we must judge this constitutional amendment by its language; by the meaning which appears on its face, and not by speculation as to the motives of those who adopted the amendment. Mr. Justice Peckham, in *Pope vs. Williams*, *supra*, said:

“The privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper; provided, of course, no discrimination is made between individuals in violation of the federal constitution. * * * The question whether the conditions prescribed by the state

might be regarded by others as reasonable or unreasonable is not a federal one."

Indeed, the wisdom or expediency of a given law has never been permitted to be drawn in question by the courts in determining its validity. Mr. Justice White, in *McCreary vs. United States*, 195 U. S. 27, says:

"Whilst, as a result of our written constitution, it is axiomatic that the judicial department of the government is charged with a solemn duty of enforcing the constitution, and therefore, in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government, where an act which was within a power conferred, was declared to be repugnant to the constitution because it appeared to the judicial mind that the particular assertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that in our constitutional system the judiciary was not only charged with the duty of upholding the constitution, but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation."

Another rule announced by this Court, and which has been adhered to since the birth of the Court to this hour, is that the courts will not exercise the power to declare a state law unconstitutional and more especially a provision of a state constitution, except in cases where it is clear that the legislation in question violates the fundamental law. It is a settled rule and one long ago adopted, that laws are presumed to be constitutional and the courts are not justified in holding that either the legislature or the people have, in their enactment, gone beyond constitutional limits, unless the intention so to do is clearly indicated on the face of the law. The conflict must be clear. So clear, indeed that the mind, in considering the constitutionality of the law in question, must be able to reach but one conclusion and that one that the law is unconstitutional. This doctrine was announced with great power by Mr. Justice Brewer in the 181 U. S. 286.

Another rule adhered to by this Court is that the meaning of a state statute or constitution, when once explained or defined by the highest court of a state, is binding and that this Court, in the face of such defined meaning, can concern

itself solely with the effect of the law within the meaning given to it by such state court. See Webster vs. Cooper, 14 Howard 488, 14 L. Ed. 502. In this case, Mr. Justice Curtis said.

"The exposition of both (meaning the constitution and statutes) belongs to the judicial department of the government of the state and its decision is final and binding upon all other departments of that government and upon the people themselves until they see fit to change their constitution, and this court receives such a settled construction as part of the fundamental law of the state."

See, Southern Railroad Company vs. Orton, 6 Sawyer, 32 Fed. 478. Holding settled judicial construction of constitutional provision regarded as becoming part of the instrument.

Mitchell vs. Lippencott, 2 Woods 372. Collecting cases and holding settled construction of the state statutes, considered part of the statutes.

State vs. Grand Trunk Railroad Company, 3 Fed. 889, and McClure vs. Owen, 26 Iowa 253. Both holding federal must follow state courts in construction of state constitution.

Tested by the rules above indicated, how

does the constitutional amendment now under consideration stand? The Supreme Court of the State of Oklahoma, in the case of *Atwater vs. Hassett*, *supra*, declared that the purport of the amendment was that all persons, in order to have the right of suffrage in Oklahoma, must be able to read and write, except those whose ancestors could vote under any form of government prior to 1866; and that this meant not the immediate ancestors of the citizen who offers himself for registration or voting, but any ancestor, no matter how far removed he might be in the lineal line.

If, therefore, when a citizen appeared at the polls, he was challenged on the ground that he could not read and write, he still was not excluded by the terms of the amendment, if any ancestor of his, however remote, had exercised the right of suffrage. Now, there may have been a good reason for the passage of this amendment. It must be observed that we are not dealing here with state statutes which are sometimes passed when the air is thick with prejudice and passion, and without critical examination and consideration, but we are dealing with an amendment to

the constitution of the State of Oklahoma, which was submitted to the entire people of the state, and voted upon as well by those who could not read and write as by those who could, and voted upon by citizens regardless of the fact whether their ancestors could vote under any form of government prior to 1866. All male citizens of the State of Oklahoma, 21 years of age, and qualified by residence participated in the election at which this amendment was submitted. It became, therefore, a part of the fundamental law of Oklahoma, adopted by its entire people. The people of Oklahoma, therefore, in their sovereign capacity, said that notwithstanding the general educational qualification required by the amendment, men who could not read and write, but whose ancestors could vote should be permitted to vote. There is no reason why under our system of government, the state shall not, as an act of grace, give those men who constitute an entire class exemption from a general suffrage qualification. What objection could there be to a suffrage law which made a privileged class out of men who had served their country faithfully and loyally as soldiers? The states of this union from time to time have given bounties in the way of property not

only to these soldiers, but to their descendants. It is but an expression of gratitude on the part of the state to those who have preserved it. And there is nothing in the constitution or laws of the United States, and nothing in the form and structure of our government which debars the state from paying this debt of gratitude by giving these soldiers exemption from a general suffrage qualification to which they have not attained.

If this can be done without discrimination against the negro on account of race, color or previous condition of servitude, why cannot this act of grace be extended to a class who have not attained to the general qualification prescribed by the amendment but whose ancestors were voters under some form of government? It is true, we think, that one whose ancestors have taken a part in the management and conduct of government in other times, by the exercise of the right of suffrage, is more qualified to take a part in the conduct and management and development of his own government, even though he cannot read and write, than one who cannot read and write and whose ancestors at no time have had a part either in the frame work or the preservation or

the management of government through the right of suffrage. It is fair to assume, we think, that the descendant of ancestors who were voters has inherited to a great extent a love of government and a capacity for participation in its affairs. It is doubtless true that a large majority of the men who wrested the Great Charter from King John could not read or write. Yet their participation in the affairs of government; their intimate knowledge of those things which were necessary to a free people, made them competent in every way to exercise the right of suffrage. Here, the privilege of exemption is given by the amendment to the constitution, not as in the instance above cited, because of the gratitude of the state, nor of its appreciation for distinguished services rendered upon the field of battle, but it is given for the higher governmental reason that the descendant of those who have been identified with the making and preservation of the government have in themselves qualifications which exist independent of their ability to read and write. The Supreme Court of Oklahoma, in the case of Atwater vs. Hassett, above cited, has suggested this idea. Mr. Justice Williams, in delivering the opinion of the Court, said:

“It is a matter of common knowledge that the population of this state is cosmopolitan, embracing every creed and race; from practically every state in the union. All of these persons who were on January 1st, 1866, or at any time prior thereto entitled to vote under any form of government, or state or territory of this union, and their lineal descendants, regardless of race or previous condition of servitude, are permitted to vote at the elections in this state without complying with the educational requirements of said provision. That is a classification based upon reason. That is, that any person who was entitled to vote under a form of government on or prior to said date, is still permitted to qualify to exercise that right; and the presumption follows as to his offspring. That is, that the virtues and independence of the ancestor will be imputed to his descendants, just as the iniquities of the father may be visited upon the children unto the third and fourth generations. But as to those who were not entitled to vote under any form of government on said date or any prior time, and his descendants, there is no presumption in favor of their qualifications and the burden is upon them to show themselves qualified. This does not apply to any one race, but to every race that falls within this disqualification.”

Here the highest court of the state, in sustaining the validity of this constitutional amendment, has not only defined and explained

the meaning of the amendment, but has stated the purpose of its creation and adoption.

But it is contended that there is no such thing under our governmental system as an hereditary right to vote. We are unable to perceive why, if a state may lawfully exempt a certain class from the general qualification of suffrage, not discriminating against any citizen on account of race, color, or previous condition of servitude, it may not carry that exemption to the descendants of those persons for whose benefit the class was primarily accorded. There is nothing in the constitution or laws of Oklahoma which prohibits such exemption. And there is nothing in the constitution of the United States which indicates any such prohibition.

With reference to suffrage, the people of a state may do as they please, limited only by the terms of the Fifteenth Amendment, as to race, color, etc. No matter how fanciful an exemption may be, no matter how capricious and unreasonable it may appear to be, it yet is within the power of the people of a sovereign state of this union to place any limitations it sees fit upon suffrage and grant any exemption, provided al-

ways, that they keep within the Fifteenth Amendment to the Constitution of the United States.

This paramount and unquestioned power of the state being conceded, the Supreme Court of this state has said that the power has been lawfully exercised in the passage of the constitutional amendment now under consideration.

But it is contended that this amendment is in contravention of the Fifteenth Amendment to the federal constitution because on its face it discriminates against the negro. This is argued from the date 1866, which, as they claim, was arbitrarily selected. It is true that 1866 was four years prior to the passage of the Fifteenth Amendment in 1870, and it is contended that the date, 1866, was selected because at and prior to that time the negroes had not yet been made citizens of the United States by the Fourteenth Amendment, and protected against discrimination by the Fifteenth Amendment; and that, therefore, it must have been aimed at the negro, because a very much greater number of white men who could not read and write would come within the exemption than negroes. And for the further reason that as an historical fact, it is known that

the ancestors of but few negroes could vote prior to 1866, under any form of government, and that, therefore, in its necessary effect, it disfranchises in the State of Oklahoma a large percentage of its negroes.

While this Court doubtless takes notice judicially of the public history of the country, and of the fact that 1866 was a date immediately after the emancipation of the negroes, yet a knowledge of this historical fact does not establish that this law, on its face or in its purpose, was intended to discriminate against the negro on account of his race, color, or previous condition of servitude. The selection of the date 1866 by the people of Oklahoma, as the time at which and prior to which the qualifications of ancestors to vote were to be found, does not indicate or discover an intention on the part of the framers of the constitution to discriminate against the negro. If 1871 had been selected as the date it would have had no more nor less significance than 1866. It is true that 1871 would have been a date succeeding the time at which the Fifteenth Amendment was adopted, but this would have given the citizen simply a little longer line of ancestors through whose qualifica-

tions he might claim the right to vote, although he himself could not read and write.

But it is claimed that this law necessarily, in its purpose and effect, discriminates against the negro for the following reason: It is said that if a negro in this state were descended from a man in Georgia, for instance, all of whose ancestors were disqualified because they were slaves, and none of whom for that reason ever had a right to vote under any form of government, that this is a discrimination against the negro on account of his previous condition of servitude. In other words: It is contended that when the constitutional amendment of Oklahoma provided that citizens here could vote notwithstanding they could not read and write if their ancestors could vote under any form of government, it tied the law of the last named government to the constitutional amendment and read that law into the amendment, and if, by reading such law of another government into the amendment it was found that the ancestors of the person presenting himself at the polls were disqualified from voting because they were slaves, it was per se a discrimination on account of previous servitude.

It appears clear to us that this position is logically unsound. Here the privilege of exemption is granted to a descendant who cannot read and write because his ancestor could vote, under some form of government. The only portion of the law of the other government which is attached to and read into the constitutional amendment is that portion which denies the right of the ancestor to vote. In other words, the people, in adopting this amendment, were concerned not with the reason of the disqualification of the ancestor, but with the fact of disqualification. The inquiry which the election officer was ordered by the amendment to submit to the citizen offering himself at the polls was whether his ancestor could vote; not how and why his ancestor was disqualified from voting.

If we adopt this meaning of the amendment the law becomes uniform as to a particular class, and in no sense arbitrary or discriminating. This Court has held frequently and notably in the Legal Tender Cases, that while the Congress of the United States might not in specific terms destroy a contract, yet if, in a general scheme of legislation, within the power of Congress, a con-

tract or right should be consequentially impaired or destroyed, persons so injured cannot complain. Here the State of Oklahoma was well within its power when it sought to make an exemption in favor of a class of people. If the scheme of exemption was lawful, and there can be no doubt about this, because the state is, after all, the *exclusive* judge of the limitations it shall place upon suffrage, controlled of course, by the Fifteenth Amendment, then the fact that in this general scheme of exemption or granted privilege, one man who cannot read and write may be debarred from voting because his ancestors were slaves, and not permitted to vote for that reason is simply a consequence of the law, affecting the individual but not destroying the general scope of the law itself. To state the matter in another way, the State of Oklahoma granted an exemption to an entire class of people as regards suffrage. But it did not limit that exemption to people whose ancestors were not slaves. The amendment cut out a descendant of a Rhode Island ancestor although that ancestor was disqualified because he did not own property. The amendment eliminates descendants of men in another state who were disqualified because they did not

have good moral character. It eliminates descendants of men from other states who could not vote because they could not read and write; because as will be shown hereafter, the disqualifications for voting in the states of this union prior to 1866 were as varied and diverse as the states themselves.

This being so, it cannot be said that the people of Oklahoma, in adopting this amendment intended to discriminate against the negro because more negroes would be found whose ancestors could not vote under any form of government prior to 1866 than white men; nor because one negro's ancestors might be disqualified under a form of government because they were slaves, and others might be disqualified for many of the other reasons of disqualification existing in the states of this union prior to 1866.

Considering, therefore, the general and undisputed right of the state to limit the right of suffrage although that limitation may necessarily eliminate more negroes than white men, it seems to us it must follow that this amendment is not on its face, nor yet even in its effects, a necessary discrimination against the negro race.

It is clearly not a discrimination on account of color, because the privilege of exemption will let in black men as well as white men. It is not a discrimination on account of race, because it lets in a descendant of an African who could vote, as well as a Caucasian. It is not a discrimination on the ground of previous condition of servitude because it does not either on its face or in its purpose impute to the negro citizen of this state the *reason for his ancestors disqualification*, but simply the fact of disqualification.

If the ancestors of a citizen of this state were all slaves and for that reason were disqualified, by no sort of just reasoning can that slavery be imputed under this law to the citizen here. Although his ancestor was a slave he himself is no longer a slave, and it is not logical, it seems to us, to say that because his ancestor was a slave and disqualified for that reason that therefore, he is excluded because his ancestor was a slave. The law of the other government is invoked simply and solely for the purpose of determining whether the ancestors of a citizen of this state could vote at any time under any form of government; not for the purpose of finding the reason

for such disqualification. We are dealing with a condition of disqualification; and not with the reason which led up to the condition of disqualification. It is an historical fact that many negroes prior to 1866, or their ancestors could vote in many of the states of this union.

In the celebrated Dred Scott case, as learned and accurate a Judge as Chief Justice Taney had stated in his opinion that the early constitutions of the states did not recognize the negro as a citizen and permit him to vote. This was ~~exclusively~~ answered and overcome by Justice Curtis in his celebrated dissenting opinion in that case. Justice Curtis showed that at the time of the ratification of the Articles of Confederation, all free and natural born inhabitants of the states of New Hampshire, Massachusetts, New York, New Jersey and North Carolina, though descended from African slaves, were not only citizens of those states but such of them as had the other necessary qualifications possessed the franchise of electors on equal terms with other citizens.

It is true that many of the southern states immediately prior to 1866 had suffrage

laws which limited the right exclusively to white men; but many of the prior constitutions of those same states permitted negroes under certain conditions to vote. The learned judge who decided the case of *Atwater vs. Hassett*, supra, by a diligent search of the various constitutions of the different states, found that on and prior to the 1st day of January, 1866, negroes were eligible to vote; in Vermont, 1793; Massachusetts, 1780; New Hampshire, 1792; Maine, 1819; Rhode Island, 1842; New York, 1846; Michigan, 1850; New Jersey, 1776; and that negroes were eligible to vote at different times prior to 1866 in the following states: In Maryland, 1776; Tennessee, 1796; Texas, 1836; Kentucky, 1792; Delaware, 1776; Alabama, 1819; North Carolina, 1776; Connecticut, 1818; Pennsylvania, 1790. It will thus appear that not a great number of negroes would be disqualified as voters in this state because their ancestors could not vote. The Supreme Court of this State, having construed this amendment to mean that the right of any ancestor to vote, no matter how far removed he may be in the line of ascent, qualifies the citizen here who cannot read and write, such construction is binding, and it cannot be said, therefore, that this amendment

was intended to disqualify negroes in this state whose ancestors could not vote on account of slavery during the years of slavery.

The amendment is not confined to that class of cases which includes only those ancestors which were disqualified on the ground of slavery but the privilege under the amendment is extended to every citizen of this state, any one of whose ancestors at any time, under any form of government, took a part in government through the exercise of the rights of suffrage. A class, a privileged class, has been exempted from the general provisions of the law. The state had a right to exempt that class. No element of discrimination appears anywhere on the face of this law, and when it is given the purpose and effect given to it by the Supreme Court of this state, no intention to disqualify any citizen of this state on account of the slavery or the previous servitude of his ancestors, can be logically deduced.

We repeat again that the meaning of this law was a matter for the state court. That meaning having been discovered and declared by such court, any claim of discrimination under such meaning cannot be asserted.

Oklahoma is not the only state of this union which has adopted this character of law. It has been in the constitution of Louisiana for probably more than fifteen years. It has been in the constitution of North Carolina for nearly as long a period, and like statutes are upon the books of some of the northern and eastern states. Professor Stimson, in his book, entitled "Federal and State Constitutions of the United States," on page 224, speaks of what is known as "grandfather clauses." We quote as follows:

"This principle recently adopted in state constitutions mostly in southern states but also in some northern states operates as an exception to the property and educational qualifications. Thus, in New Hampshire, all persons who had the right to vote at the time of the adoption of the new constitution, 1903, or were sixty years of age on January 1st, 1904. So in Delaware, the educational qualification only applies to persons who become 21 years old or are naturalized United States citizens after January 1st, 1900."

Here New Hampshire names two privileged classes who are to be exempted from the general qualifications necessary to suffrage. It declares that every man who had the right to vote in 1903, the date of the adoption of the constitution, should vote thereafter without complying

with the other qualifications prescribed by law and he still could vote if he were sixty years old on January 1st, 1904. We do not suppose that anybody has, up to this hour, questioned the constitutionality of the New Hampshire law or of the Delaware law, as not being within the equal protection of the laws, or as in violation of the Fifteenth Amendment to the Constitution. These laws, passed by these states, are clearly valid, although they have gone one step further than Oklahoma, and exempted two classes of citizens instead of one. The truth is, if it were not for the sentiment which has grown up with reference to negro suffrage in the south and for the tenderness with which the courts have regarded these mar-
witted citizens, and their descendants, no question would be made about the validity of this amendment. A general qualification has been placed in the amendment to which all citizens *may attain*, if they are diligent and worthy, and desire to take a part in the political affairs of their country. Oklahoma is filled with negro schools. Appropriations are made yearly and taxes voted upon all the people alike, for the support and maintenance of such schools. The negro in Oklahoma has the opportunity to prepare himself for the general quali-

fication of suffrage. Any person 21 years of age, who applies himself to that purpose, may learn to read and write within a twelve months. We have, therefore, a suffrage law to the *terms of which all men can attain*; the privileged class being protected by an act of grace on the part of the state.

We therefore, conclude that this entire amendment is constitutional. It does not impinge upon any provision of the federal constitution and is clearly within the power reserved to the State of Oklahoma as a constituent member of the federal union. It does not on its face discriminate. It does not in its purpose and effect, necessarily discriminate. It is not *clear*, in our judgment, to any fair and impartial mind that it is a violation of the federal constitution; and all this being true, it occurs to us that this great court will hesitate long and consider well before it strikes down this amendment adopted by the people, soberly and in a time of peace, nearly forty years after the adoption of the Fourteenth and Fifteenth Amendments to the federal constitution, after the passions and resentments engendered by the civil war had subsided, and when the door of hope and opportunity had been thrown wide open to every

citizen of the United States living in Oklahoma by the erection of school houses and churches where every race is permitted to qualify itself for participation in government and to worship in its own way and in its own house.

The appellants alone are not here on trial. The sovereign State of Oklahoma as well as others is here and it is in her behalf as well as the appellants that we invoke judgment.

IV.

EVEN THOUGH THE EXEMPTION PRIVILEGE PROVIDED IN THE CONSTITUTIONAL AMENDMENT OF OKLAHOMA MAY BE INVALID, YET THE BODY OF THE LAW MAY BE PERMITTED TO STAND.

Without conceding for a moment that this amendment to the Oklahoma Constitution is invalid, either in whole or in part, we yet feel it necessary to call the attention of the Court to the Fourth Proposition above stated.

It is a settled rule of construction announced by this Court in a great many cases, that even though an exemption to a certain class in a constitution or statute may be declared invalid

and of no effect, yet that the main body of the law will be preserved if it is possible to separate the exemption from the main purpose. The doctrine is clearly announced in 120 U. S. 97, 30 L. Ed. 588, 590, where Mr. Justice Fields, speaking for the Court, said:

^{part}
“The unconstitutionality of the statute was separable from the remainder. The statute declared that in making its statement to the value of the property the railroad company should ~~not~~ omit certain items. That clause being held invalid, the rest remained unaffected and could be fully carried out. An exemption which was invalid was alone taken from it.”

Again, the Supervisors of Albany vs. Stanley, 105 U. S. 305, Mr. Justice Miller, delivering the opinion of the Court, declared:

“It is very difficult to conceive why the act of the legislature should be held void any further than when it affects some right conferred by the Act of Congress. If no such right exists the delicate duty of declaring by this Court that an act of state legislation is void, is an assumption of authority uncalled for by the limits of the case, and unnecessary to the assertion of the rights of any party to the suit. The general proposition must be conceded that in a statute which contains invalid or unconstitutional provisions, that

which is unaffected by these provisions or which can stand without them, must remain."

From the opinion in the Trade Mark cases, 100 U. S. 82, 25 L. Ed. 550, we quote:

"While it may be true that when one part of the statute is valid and constitutional and another part is unconstitutional and void, the Court may enforce the valid parts where they are distinctly separable, so that each may stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear."

A great many of the decisions of this Court could be cited to sustain this well accepted rule of constitution. The cases we have quoted from cite many other cases sustaining the opinions. We do not deem it necessary, therefore, to encumber the record with quotations from other utterances of this Court.

Here in Oklahoma the basis of the right of suffrage is made primarily to depend upon an ability to read and write. This furnishes a test or qualification to which all men by diligence and reasonable efforts, may attain. And therefore, the general purpose of the statute being education to a limited extent, and it being possible for

all men to bring themselves within that purpose,
an elimination of the exemption clause leaves the
body of the law in full force and effect.

Respectfully submitted,

C. B. STUART, A. C. CRUCE,
W. A. LEDBETTER, NORMAN HASKELL,
C. G. HONOR,
Attorneys for Plaintiffs in Error.

Office Supreme Court, U. S.
FILED.

OCT 24 1913

JAMES H. McKENNEY,
CLERK.

THE OKLAHOMA SUFFRAGE AMENDMENT CASE

Supreme Court of The United States.

OCTOBER TERM, 1913.

No. ~~426~~ 96

FRANK GUINN AND J. J. BEALL,

vs.

THE UNITED STATES

TO THE HONORABLE THE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

The petition of WILLIAM L. MARBURY, respectfully
shows:

FIRST: That your petitioner, who is an attorney and counsellor at law, duly admitted to practice in this Court, has been employed by and is of counsel for the defendants, now plaintiffs in error, in the case of CHARLES E. MYERS and A. CLAUDE KALMEY, plaintiffs in error, vs. JOHN B. ANDERSON, et al, being No. 58 on the Docket of the present October term of this Court, and also in Nos. 59 and 60, which cases were and are actions for damages against your petitioner's clients, based upon their alleged refusal, as Officers of Registration, appointed under Chapter 525 of the Acts of the General Assembly of Maryland of 1908, known as the "Annapolis Registration Law," to register the plaintiffs as voters lawfully qualified to vote at municipal elections in the City of Annapolis, in the State of Maryland, because of their race, color and previous condition of servitude, said refusal being alleged to be

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in violation of their rights under the Fifteenth Amendment of the Constitution of the United States; that several of the questions involved in the said Annapolis cases are also involved in this case, among others being the question as to whether it is necessary in cases of this kind for this Court to pass upon the question of the validity *vel non* of the so-called "Grandfather's Clause" in the Constitution of Oklahoma, and a substantially similar clause in the Annapolis Registration Law.

SECOND: Whether or not said Grandfather's Clause is or is not violative of the provisions of the Fifteenth Amendment of the Federal Constitution.

THIRD: Whether the said Fifteenth Amendment, assuming it to be construed to be intended to apply to State elections as well as national elections, is within the power of amendment conferred upon three-fourths of the States by the people in the adoption of the Federal Constitution and similar cognate questions.

Your petitioner, therefore, believes, and respectfully represents, that the interest of his said clients may be materially affected by the decision of this case.

A brief presenting and discussing the said questions has been filed on behalf of your petitioner's said clients in said Annapolis cases Nos. 58, 59 and 60, and your petitioner now prays that the Court will grant him leave as *amicus curiae* to file the same brief, a copy of which is attached to this motion, in the above-entitled cause, that the same may be considered by this Court in connection with their decision herein.

And your petitioner further shows that he has served a copy of said brief on Honorable J. W. Bailey, counsel for the plaintiff in error, and upon the Honorable, the Solicitor General, counsel for the United States, in this case, together with a notice of your petitioner's intention to present this motion.

Baltimore, October 23, 1913.

.....
Petitioner.

SUBJECTS

FILED
OCT 17 1913

OCT 17 1913

JAMES H. RICHNEY,
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

FRANK GUINN and

J. J. BEAL,

Plaintiffs in Error

vs

THE UNITED STATES,

Defendant in Error

No. 900,

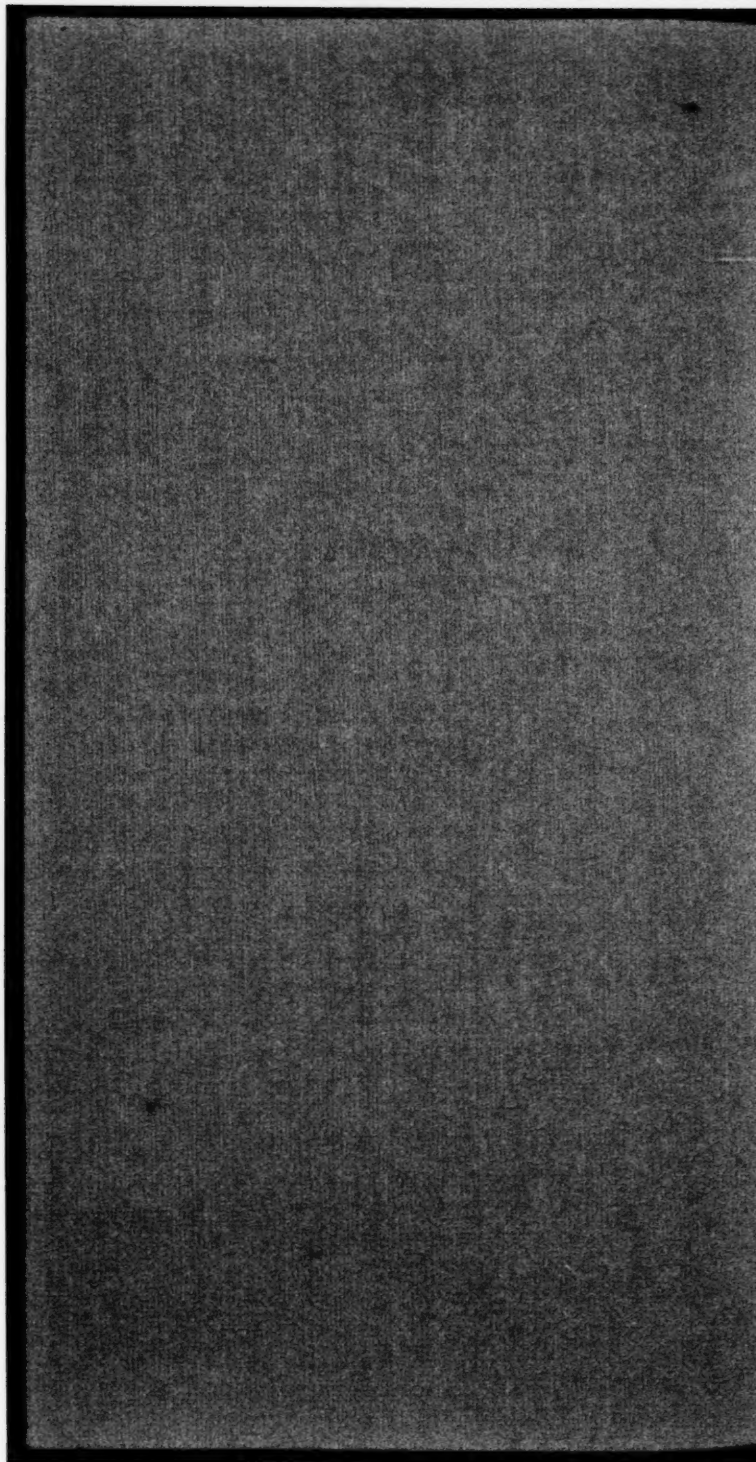
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BY PERMISSION OF THE ATTORNEY GENERAL

JOHN H. SURFORD,

JOHN EMBRY,

Attorneys



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IN THE
SUPREME COURT
OF THE
UNITED STATES

FRANK GUINN and

J. J. BEAL,

Plaintiffs in Error

vs

THE UNITED STATES,

Defendant in Error

No. _____

BY PERMISSION OF THE ATTORNEY GENERAL

The prosecution in this case is under section 19 of the new Penal Code, upon an indictment charging the accused, who were inspector and judge, respectively, of the Congressional, 1910, election held in Union Township election precinct, Kingfisher County, Okla-

homa, with conspiring to injure, oppress and intimidate Edward M. Keel and many other citizens of the United States, negroes, in the free exercise and enjoyment of a right and privilege (to vote for qualified candidates for Congress) secured to them by the constitution and laws of the United States, on account of the race and color of such citizens. This section is the same as section 5508 R. S., and the decisions upon the latter section have like relations to the former.

That the right of a qualified voter to vote for a candidate for Congress is fundamentally based upon and secured by the constitution of the United States, and that section 19 of the new Penal Code protects the same and is constitutional, are well settled.

Felix vs. United States, 186 Fed. 685.

United States vs. Stone, 188 Fed. 836.

Ex parte Yarbrough, 110 U. S. 651, 28 L. Ed. 274.

Wiley vs. Sinkler, 179 U. S. 58, 45 L. Ed. 84.

Swofford vs. Templeton, 185 U. S. 487, 46 L. Ed. 1005.

Logan vs. United States, 144 U. S. 26, 33 L. Ed. 439.

Baldwin vs. Franks, 120 U. S. 678, 30 L. Ed. 766.

Lackey vs. United States, 107 Fed. 114, 120.

Such legislation is directed against individual action as such, whether it be the action of an official or of a private citizen, although not appropriate legislation for the enforcement of the fifteenth amendment to

the Federal constitution, which is directed against state action only.

Karem vs. United States, 121 Fed. 250.

James vs. Bowman, 190 U. S. 127, 47 L. Ed. 980.

That is, section 19 of the Penal Code is directed against individuals, official or private, who conspire against federal rights of a citizen, but does not protect a negro's right to vote at a purely state election, because the fifteenth amendment is merely directed against state action in that behalf, and does not warrant Congressional legislation directed against individual action; but section 2, article 1, of the constitution, providing for the election of members of Congress by citizens having the qualifications of electors for the most numerous branch of the state legislature, does authorize congressional legislation directed against individual action, for the protection of such qualified electors desiring to vote for candidates for Congress.

Therefore, the accused are prosecuted under section 19, because Congress has power to so legislate to protect such Congressional election, without reference to the race or color of the citizen claiming such protection and section 19 of the Penal Code authorizes their prosecution, if Keel and others were qualified electors.

When we pass from the statute under which the

accused are prosecuted, to determine whether the citizens conspired against were qualified electors, the fourteenth and fifteenth amendments become relevant to the inquiry, whether the state could rightfully impose the educational qualifications in the manner it did.

If the fourteenth and fifteenth amendments, directed against state action, incapacitate the state from so imposing such qualifications, then such qualifications are not essential to the enjoyment of the rights protected by section 19 of the Penal Code; and it is thus, as touching the qualifications of the electors, that the fourteenth and fifteenth amendments are material. It is true that the indictment charges that these citizens were so conspired against on account of their race and color, but such averments merely allege a motive in defense of which the official character of the accused could not be interposed, because, though accused may pretended to have acted officially in enforcing the law, they could not lawfully conspire to enforce it oppressively against citizens because of their race and color.

The franchise amendment referred to, known as section 4 (a) of article 3 of the Oklahoma Constitution, adopted since statehood, is as follows:

"No person shall be registered as an elector of this state or be allowed to vote at an election herein, unless he be able to read and write any section of the constitution of the state of Oklahoma; but no person,

who was on January 1st, 1866, or at any time prior thereto, entitled to vote under any form of government or who at that time resided in some foreign nation, and no lineal descendant of such person shall be denied the right to register and vote because of his inability to so read and write sections of such constitution.

"Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required.

"Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officers when electors apply for ballots to vote."

Is this amendment constitutional in its application to the citizens mentioned in the indictment?

We submit that the form of the amendment, exempting certain persons from the educational test by way of exceptions to a general provision imposing such test, is not determinative of its character, since it clearly divides the mass of those otherwise qualified to vote, into two classes, one of which is subjected to, and the other exempted from, such test.

Kansas City vs. Whipple, 136 Mo. 475.

This franchise amendment attempts to make certain political privileges and disabilities hereditary,

and in that it destroys rights which inhere in the status of national citizenship; and it is directed against the negro race and makes certain privileges and disabilities to depend upon prior rights which depended upon race and color, and in that it is in conflict with the fifteenth amendment to the constitution of the United States.

II.

It impairs rights inhering in the status of national citizenship, and thereby denies the possessors thereof the equal protection of the law, and abridges privileges and immunities of citizens of the United States, in violation of the fourteenth amendment, and abridges the rights of citizens under section 2, article 1, of the federal constitution.

It is quite generally held that the fourteenth amendment confers no new rights, but is an additional guaranty of those already existing; and that, since the right to vote is a privilege which may be conferred or withheld by the state, the fourteenth amendment added nothing, and does not pertain, to such privileges. This rule has grown out of a number of cases relating to election laws containing provisions of uniform prohibition, involving only the state's right, upon proper classification to withhold or confer the privilege; but, where the state, in conferring such privilege, so arbitrarily discriminates against a citizen as to impair rights inhering in the status of national citizenship, the state thereby abridges that which it is not at

liberty to confer or withhold, and such, as against the state, is more than a privilege; it is a right. And it is not thought that the courts will hold the 14th amendment inapplicable to federal elections, where the objection is that arbitrary discrimination has been exercised in conferring the franchise. If the citizen has a federal right not to be so arbitrarily discriminated against, such is a right as substantial as other substantial rights protected by such amendment.

There is a marked difference between a law withholding the franchise from a designated class upon reasonable grounds of public policy; and a law discriminating between citizens of the same class, in conferring the franchise.

The educational qualification of the Oklahoma Constitution was not imposed to discover the fitness of the voter, for there are thousands of full blood Indians in the state, who know nothing of government except their former tribal type and such as they have learned since statehood, who cannot speak the English language, nor read nor write a sentence, and who are under the guardianship of the government and considered incompetent to make the most temporary contracts relating to their allotments, but who, under this amendment and the decision of the Oklahoma Supreme Court, are eligible, without taking the educational test, to vote for all public officers, including candidates for congress, and upon the most complex public questions which entail taxes and burdens upon others from which

their own lands are exempt; from which, and many other circumstances, that might be cited, it is clear this educational test was not imposed as a qualification essential or even desirable, but merely as a discrimination against a class, most of whom were disfranchised on and prior to January 1, 1866.

The Oklahoma amendment confers the franchise, but discriminates in so doing, and we submit that the fourteenth amendment protects the citizen from an unjust discrimination in that respect in federal elections; and in such particular this case differs from those holding the fourteenth amendment not applicable.

The government of the United States, composed of citizens, is republican in form, having a constitution, the chief cornerstone of which is, "That all men are created equal;" and, in all of its essential characteristics, opposed to the aristocratic and monarchical forms of government.

Political heredity is the badge of both aristocracy and monarchy; of the former, when such heredity pertains to the electorate; and of the latter, when it pertains to the officers.

Under our constitution, neither the status of national citizenship nor political privileges or disabilities are hereditary.

"All persons born or naturalized in the United

States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside."

14th Amend. Const.

And this is true of one born within the United States and subject to its jurisdiction, though his father be an alien, *United States vs. Wong Kim*, Ark., 169 U. S. 649.

The national citizenship of one naturalized or born within the United States and subject to the jurisdiction thereof, is not by inheritance, but by adoption or birth within the government and its jurisdiction with a character given by the federal constitution. And where the law seeks to confer political rights or visit political disabilities of the ancestor upon the descendant, it seeks thereby to anticipate and impair that citizenship whereunto the citizen is born, and thereby change his relations to the federal government. Every citizen of the United States is a constituent member of the national sovereignty, *Dred Scott* case, 19 Howard 393; and the exercise of suffrage is a sovereign act, *Kansas City vs. Whipple*, 136 Mo. 475, 35 L. R. A. 749.

And while the right to vote is not necessarily a right and privilege of such citizen, the right to vote for Congress becomes such right and privilege, and the exercise thereof an act of national sovereignty, when the state confers the right of suffrage upon a

class to which such citizen belongs.

In conferring the right of suffrage, may the state, in order to abridge the exercise thereof by a citizen, distinguish him from the class with which he is identical, upon considerations anterior to his citizenship, and pertaining wholly to another? In other words, can the state impair that right of national sovereignty, or can it only regulate its exercise?

To say that a woman shall be disfranchised because of her sex, is to regulate her rights of citizenship upon a consideration pertaining to herself; but to disfranchise her because her mother was disfranchised, while other women vote, would be to impair her rights of citizenship; because she does not inherit her citizenship from her mother, and there can be no privity of disability; and whatever less rights as a citizen she may have, upon considerations pertaining to her mother, is impairment of citizenship rights by the law, and not the inheritance of political disability from her mother; and while a state may, as a matter of state policy, regulate suffrage as a conditional right of citizenship, upon considerations pertaining to the citizen, yet when a state distinguishes a citizen, upon considerations anterior to his citizenship and pertaining wholly to another, his ancestor, from the class of citizens with whom he is otherwise identical, the state simply says that he shall be born with less rights and less a citizen than other citizens similarly situated. This is to change his relations with the

Federal government, and to say, though he is a citizen, similarly situated with other citizens entitled to vote for Congressmen, he cannot so vote, or, if so, only after meeting additional requirements, because the state, by law, has lessened his prerogatives of national citizenship. This no state can do; and for this reason, so far as the national government is concerned, no state can make political disabilities hereditary, nor impose a disability upon a descendent because of the prior status of his ancestor.

If it be admitted that the states possess the constitutional power to lessen the prerogatives of national citizenship, it would follow that they contain within themselves the constitutional power to work the dissolution of the national government; for no government can exist without citizens, nor long exist with citizens the prerogatives of whom such government cannot protect.

Our proposition is this: While a state may, within constitutional limits and upon considerations pertaining to himself, deny a citizen the right of suffrage; yet, when it confers that right upon a class which, if its members be identified upon considerations pertaining to themselves, would include such citizens, the state cannot distinguish such citizen from such class upon an assumption that such citizen is less a citizen than the others, or has less rights than the others. Every citizen born within the United States, and subject to its jurisdiction, is identical in rights with every

other citizen, and has the identical right to exercise powers touching the Federal government, given by the state, except as he may be distinguished from other citizens upon reasonable considerations pertaining to himself. And this attempt to say that one native born citizen shall have more rights than another native born citizen in voting for Congressmen, for no other reason than that they were born with different rights, is an attempt to impair the national citizenship of one and to enhance that of the other, which cannot be done by a state.

To say that a citizen's ancestor was disfranchised is merely to distinguish the ancestor and not the citizen from the class of voters.

Now, a foreign born citizen, upon that consideration pertaining to himself, may be distinguished from those native born; but no such distinction can be made between native born citizens merely because the ancestor of one is distinguishable from the class common to such citizens.

Consider a native born son of a father entitled to vote, and a native born son of a father not entitled to vote, similarly situated; the state cannot distinguish the latter from the former in the right to vote for a candidate for Congress except upon the theory that he was born with less rights of national citizenship than the other, for such descendant is not himself distinguishable from the class common to both; and this, in effect, is changing the relation of the less

avored to the Federal government, from that enuring constitutionally to a citizen of the United States. It is not only denying him the suffrage, but it is abridging his capacity as a national citizen to exercise suffrage when given.

This is urged in connection with the right of a citizen of the United States to vote for candidates for Congress, when the state has conferred the right to vote for the most numerous branch of the state legislature upon the class to which, upon considerations pertaining to himself, he belongs.

Of course, these suggestions encounter the rule, that the right to vote is not necessarily a right of a citizen of the United States, and that the right fundamentally based upon the constitution of the United States to vote for Congressmen enures to those only who are qualified electors under the laws of the state.

But Section 2 Article 1 of the Constitution of the United States does not require that such a citizen of the United States, to be so entitled to vote, shall have had the qualifications of electors in the state of Georgia in 1866, or that he shall be the descendant of such person; but it impliedly excludes such former qualifications by the specific requirement that he shall have the qualifications requisite for an elector of the most numerous branch of the state legislature, when and where he offers to vote.

Qualifications of electors in some other state and

at some other time are not the qualifications, in kind, to which Section 2, Article 1 refers.

Now, the state may, in prescribing qualifications, as such, impose many conditions that would come within the congressional requirement; but when the citizen has all the qualifications pertaining to himself, the state cannot as has been attempted by this amendment, prevent him from voting for Congressmen because his ancestor lacked electoral qualifications at some other time, or add such ancestral qualifications to those prescribed by Section 2, Article 1, of the Federal Constitution.

It will be observed that the franchise amendment recognizes that existing qualifications, personal to the voter,—those previously prescribed by the Oklahoma Constitution, and laws—and electoral qualifications of the voter or his ancestor in some Indian tribe, or other state or country on and prior to January 1, 1866, entitle the elector to vote for the most numerous branch of the state legislature, without the educational qualifications, and that the educational qualification is not a matter of merit, to discover the personal fitness of the voter, but merely in lieu of a former foreign residence or electoral qualification of himself or his ancestor.

Now, Section 2 of Article 1 of the federal constitution does not require that the elector have both the qualifications personal to the voter of an elector of the

most numerous branch of the state legislature, and that he or his ancestors should have resided in a foreign nation or had qualifications of electors in some other state or country, on or prior to January 1, 1866, or that the state may require a substitute for such foreign residence or former right to vote. And that these references to such foreign residence and former electoral qualifications, or their substitutes, are entirely foreign to the federal requirement.

When a state attempts to abridge the congressional suffrage of a citizen, who is a qualified elector under the law of the state and has all of the qualifications personal to the voter, because some other person, at some other time, in some other state (as the court judicially knows Oklahoma was not then a state) was not then entitled to vote, it is going beyond the qualifications constitutionally required of federal electors, and is attempting to require, not qualifications for electors of the most numerous branch of the state legislature, but that some other person should have possessed electoral qualifications entirely outside the constitutional requirement, or that the voter should have possessed other qualifications at some other time.

Section 2, Article 1 of the constitution of the United States is so framed that political rights under it cannot be hereditary.

It is broad enough that the state may prescribe the qualifications of electors, but it limits the federal

qualifications to those requisite for members of the most numerous branch of the state legislature; and we submit that, where the state attempts to require the qualifications of another, at a different time, and in a different state, as such, and in that name, and not involving any considerations going to the fitness of the citizen offering to vote, such requirement is outside the requirements of Section 2 of Article 1 of the Federal Constitution.

In the *Dred Scott* case, 19 Howard 393, Mr. Chief Justice Taney, in speaking of citizens of the United States said:

“They are what we familiarly call the sovereign people; and every citizen is one of the people, and a constituent member of this sovereignty.”

How can “one constituent member of this sovereignty” be less sovereign than another upon any consideration pertaining wholly to another? His right of franchise may be denied or abridged upon constitutional considerations pertaining to himself, for such would be a regulation and not a diminution of sovereignty. But such abridgement of such rights anterior to his citizenship, and upon considerations pertaining wholly to another, would not be a regulation of his exercise of sovereignty, but it would be a diminution thereof, and would have no relation to his fitness for its exercise.

We are not referring to the power of the state to

confer or deny the right of suffrage, but to the power of the state to require that one's ancestor should have been entitled to vote under some form of government, in addition to one's own qualifications as an elector for the most numerous branch of the state legislature, as conditions of the right to vote for Congressmen.

In the Dred Scott case, Chief Justice Taney said further:

"In the opinion of the court, the legislation and history of the times, and the language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves, nor their descendents, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument."

Notwithstanding the status of the negro then, the thirteenth, fourteenth and fifteenth amendments have brought him within the rights of citizenship, and his rights as such citizen are to be judged by the common standard.

The court's reference to the Declaration of Independence as relevant to the basic rights of citizens is not without value here.

"That all men are created equal" is one of the self-evident truths declared by the Declaration of Independence, which has been the heritage of every white citizen from the foundation of the government, and of

every negro citizen since his emancipation; and in the light of this eternal truth, the notion of hereditary political rights and disabilities are odious, and not within Section 2, Article 1 of the Federal Constitution; and the state can not, under the guise of prescribing the citizen's qualifications as a voter, require, as an exemption from a discriminating test, that his ancestor should have been an elector in some other state or country, at some other time.

No state can enact that white is black, and place courts under the necessity of so concluding; and where, as in this case, they superadd ancestral qualifications, as such, it is obvious that the same is a requirement not coming within the meaning of the words of the constitution which refer to the elector's own qualifications, and impliedly exclude all others.

Should it be urged that one not coming within the exemptions does not possess the qualifications of electors for the most numerous branch of the state legislature unless he be able to read and write any section of the constitution, we reply that this educational test is not imposed to discover the fitness of the voter, but as an arbitrary discrimination against a class; and that this educational test is imposed, not because the voter lacks any of the qualifications bringing him and others similarly situated, within the rights and privileges fundamentally based upon and secured by Section 2, of Article 1 of the Federal Constitution, to vote for Congressmen, but the test is imposed arbitrarily because

the voter or his ancestor was not a resident elsewhere or a voter under some other law on and prior to January 1st, 1866.

The republic was formed and the constitution adopted as opposites to political heredity; but with power in the states to prescribe the qualifications requisite to the electoral franchise.

May a state, a constituent of the republic, in virtue of its retained sovereignty, legitamatize political heredity, and thereby maintain within the body politic a principle inimicable to the essential characteristics of a republican form of government?

The state retained all power not prohibited to itself nor delegated to the national government, within which retained powers, if no prohibition exists, is as much authority, and not different in kind, as that which forms the basis of monarchy and political heredity in other government in which monarchy and political heredity are recognized as legitimate.

The American idea, that government receives its just powers from the consent of the governed, carries with it, in the absence of prohibition, the right of governmentship to consent to monarchy and political heredity; for to say that the governed cannot so consent, is to say that a power transcending the governed determines legitimacy, and makes vain the boast that those powers of government are just to which the governed consent.

And tacitly recognizing this inherent power of the people to consent to monarchy and political heredity, the founders of the republic sought to avoid it by the national constitution; not by express prohibition upon the states but by imposing upon Congress the duty to guaranty to every state a republican form of government, which is a political power, the exercise of which the courts leave to Congress.

The powers delegated to the national government are those of a republican form of government and such as are essential to national sovereignty, in the light and within the limits of the inspiration of it all, "That all men are created equal" and Congress can neither destroy the republican character of the national government, nor permit the states to so do as to the national or state governments.

But when we inquire as to the procedure whereby states may be restrained from destroying the republican form of their own government, we hear the courts saying that the question is political and the procedure is with Congress.

Then, what will prevent Congress itself from becoming the creature of states in which republican government is destroyed, and dependent upon an hereditary electorate of diminishing numbers; and, finally, sympathizing with this departure from liberty, itself neglect to perform the guaranty of a republican form of government to the states. For it does not require a statesman or jurist to see that if an hereditary and

diminished electorate becomes the master of Congress, Congress will obey its master.

Against this calamity the national constitution provides. The right of a citizen of the United States to vote for a member of Congress is fundamentally based upon and secured by that constitution, necessarily limiting the states, on prescribing the qualifications of such electors, within such bounds as do not disparage the essential principles of a republican form of government. While the states, having no guarantors of a republican form of government except Congress, and their own will, may, if they so will, through the neglect of Congress, subvert their own forms of government; yet Congress, springing ever from the free citizenship, against whom the states cannot discriminate in violation of the republican principle that all men, politically, are created equal, remains the hope of republican government and the support of the constitution.

Therefore, while the states may, could they avoid the over authority of Congress in that respect, possess the power to depart from republican forms of government, they have not the power to so taint the Congressional electorate with political heredity, as to reduce Congress to dependence upon an heredity electorate, and thereby destroy the republican form of the national government; and this inability of the state leaves such affirmative right of the citizen within the cognizance and protection of the court.

That is, since, in such applications, the violation of such republican principle is a nullity, not justifying invasion of the rights of the citizen, the court, while not enforcing the republican form of government, will protect that affirmative right of the citizen, the invasion of which may be attempted under a law violative of the republican principle, and therefore invalid.

And to deny such citizens the right to vote for Congressmen, without meeting the educational test, when others similarly situated are not so required, is to deny such elector the equal protection of the law, and to abridge the privileges and immunities of citizen of the United States in violation of the fourteenth amendment.

In *ex parte Yarbrough*, the Court said:

"But it is not correct to say that the right to vote for a member of Congress does not depend upon the constitution of the United States * * * They (the states) define who are to vote for the popular branch of their own legislature, and the constitution of the United States says the same persons shall vote for members of Congress in that state. It adopts the qualifications thus furnished as the qualifications of its electors for members of Congress. It is not true therefore that electors for members of Congress owe their right to vote to the state law in any sense, which makes the exercise of the right to depend exclusively upon the laws of the state."

In *Wiley vs. Sinkler*, *supra*, the court said:

"The state, in prescribing the qualifications of voters for the most numerous branch of the state legislature do not do this with reference to the election for members of Congress. Nor can they prescribe the qualifications for voters for those *eo nomine*. They define who are to vote for the popular branch of the state legislature, and the constitution of the United States provides that the same persons shall vote for members of Congress from that state."

See *Cooley's Const. Lim.* 568 Note and *United States vs. Moore*, 129 Fed. 633.

The qualifications, by virtue of which one votes for candidates for Congress, and the right to do so, being fixed by and fundamentally based upon the Federal Constitution, we assume that this reference to the state laws for the ascertainment of such qualifications, is a reference to laws coming within constitutional limitations, and that state laws violative of such canons of constitutional construction are not referred to, and that their requirements are not essential to the exercise of such federal right.

In the *Crurkshank* case, 92 U. S. 542, a political case, the court said:

"The equality of rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all of its citizens in the enjoyment of this principle, if within its power. The duty was originally assumed by the states; and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the rights. This, the amendment guarantees, but no more. The power of the national government is limited to the enforcement of the guaranty."

The underlying principle is this: In a republi-

can state all persons are equal, and it is no disparagement of this equality to classify persons upon the basis of reasonable distinctions, for the purpose of legislation, for every member of such state undertakes all reasonable obligations for the good of the whole.

This equality means that all persons similarly situated shall be equal; but it does not mean that those in one situation must have the same privileges and immunities as those in a situation reasonably distinguishable therefrom.

Difference between classes reasonably distinguishable are based upon the difference of situations and not upon the difference of persons.

But differences between persons in the same situation are difference between persons, making one unequal and less free than the other, and is a personal discrimination, and violates the rule against class legislation.

In *Cooley's Cons't. Lim.* 556, it is said:

"But a statute would not be constitutional which would prescribe a class for opinion's sake, or which would select particular individuals from a class or community, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt."

It may be said that a law imposing upon a class burdens or restrictions having reasonable and just relations to the situation of such class, is not class legislation merely because like burdens or limitations are not imposed upon a class distinguishable there-

from.

In such instances the law would not be a condemnation of individuals, but a regulation with respect to situations, not distinguishing between individuals, as such, but between conditions.

But when the law discriminates between individuals in like situation, according to some arbitrary classification, and not upon the basis of some reasonable difference between them, such discrimination is directed against the persons to whom it is prejudicial, is personal, and is not legitimate legislation, but is in the nature of legislative judgment and condemnation.

Cooley's Constitutional Limitation, 7th Ed. page 558, says:

"The legislature may suspend the operation of general laws of the state; but when it does so the suspension must be general, and cannot be made for individual cases or for particular localities. Privileges may be granted to particular individuals when by so doing the rights of others are not interfered with; disabilities may be removed; the legislature as *parens patriae*, when not forbidden may grant authority to the guardians or trustees of incompetent persons to exercise a statutory control over their estates for their assistance, comfort, or support, or for the discharge of legal or equitable liens upon their property; but every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws are to be governed by promulgated, established laws, not to be varied in particular cases but to have one rule for 'rich and poor, for the favorite at court and the country man at the plow.'

This is a maxim of constitutional law, and by it we may test the authority and binding force of legislative enactments."

However much a state may discriminate in conferring the right of suffrage in purely state matters, when arbitrary discrimination is attempted with respect to matters pertaining to Territorial or Federal officers, we submit it is not within the canons of constitutional construction.

This is illustrated by the decision of the Utah Supreme Court in the decision of *Lyman vs. Martin, et al.*, 2 Utah 145, in holding invalid the Utah law conferring upon both men and women the right to vote, but discriminating against men to the extent of requiring them to be tax payers in order to exercise the right.

The franchise rights of the men were depreciated below the standard of the privilege, in that they were required to be tax payers before they could exercise the same, and this was an abridgment of such privilege.

The cases of *Pope vs. Williams, supra*, *Williams vs. Mississippi*, 170 U. S. 219, 42 L. Ed. 1014; *Franklin vs. South Carolina*, 218 U. S. 161, and that class of cases, refer to laws containing the rules of uniform prohibition.

That part of the constitution of South Carolina brought in question in the *Franklin* case, operated prospectively, and was not obviously designed to take

advantage of a great body of voters, by a classification based upon irrelevant circumstances long past, as does the Oklahoma amendment. The same is true of the Mississippi law involved in the Williams case.

In *Pope vs. Williams*, *supra*, the court thought it worthy of observation that the statute in that case had not been passed subsequently to the parties' removal from another place into the state of Maryland.

The South Carolina, Mississippi and Maryland provisions were such as operated prospectively; and while inferable, those registering prior to a certain time would thereafter vote without meeting the educational test required of others registering after that date; nevertheless, the rule operated uniformly upon those complying with the registration laws prior to such date, giving all similarly situated a right to so register, and they, as a class, were reasonably distinguishable from the presumably younger and better educated men registering after such date.

But the Oklahoma law relates to a time long past, to circumstances having no reasonable relation to present fitness, and for the obvious purpose of taking advantage of negroes; to a time when, as is judicially known, most negroes were disfranchised for racial reasons.

In the case of *Yick Wo vs. Hopkins*, 118 U. S. 356, 403, 30 L. Ed. 226, the court, having the fourteenth amendment under consideration, and speaking by way

of illustration, said:

"For the very idea that one may be compelled to hold his life or means of living, or any material right, essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the very essence of slavery itself."

"There are many illustrations that might be given of this truth, which would make manifest that it was self evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely, conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because it is preservative of all rights."

In the case of *McPherson vs. Blacker*, 146 U. S. 1, 42, 36 L. Ed. 873, a case involving the selection of presidential electors, a political question, the court said:

"The judicial power of the United States extends to all cases in law and equity arising under the laws and constitution of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such constitution and laws and its validity was sustained."

Then the court repeated what it said in *Minor vs. Happersett*, "that the right of suffrage was not necessarily one of the privileges of the fourteenth amendment—and that neither the constitution nor the fourteenth amendment made all citizens voters." Using the word "necessarily," and admitting the inference that, conditionally, it might become such right.

The court said further, quoting from *Hayes vs. Missouri*, 120 U. S. 68:

"The fourteenth amendment to the constitution

of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory in which it is to operate. It merely requires that all persons subjected to such legislation should be treated alike, under like circumstances and conditions, both in the privileges and in the liabilities imposed."

"As we said in speaking of the fourteenth amendment: 'Class legislation, discriminating against some and favoring others,' is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Barber vs. Connolly, 113 U. S. 27.

In the Law of Elections, by Paine, section 6, with reference to the power of the state to prescribe the qualifications of electors, it is said:

"But this power of the state is limited by such inhibitions of the constitution as may be applicable to the subject, including those which forbid any discrimination against the citizens of any state, or the adoption of qualifications inconsistent with the guaranty of the republican form of government, or the denial or abridgement of the rights of citizens of the United States to vote on account of race, color or previous condition of servitude."

Take the question under consideration. A law denying the right to vote to all persons except such as can read and write, would bear a reasonable relation to the good of the whole, because it would confine the elective franchise to those most competent to exercise it, while each man so disfranchised would remain equal to, and equal in freedom with every other man who could not read and write.

There would be no impairment of the equality of

persons in the abstract. But to give the ballot to an illiterate whose ancestor was a voter, and deny it to another whose ancestor was not a voter, bears no reasonable or just relation to the fitness of these parties to exercise the present franchise; because the person denied the right may in fitness for its exercise, be far superior to the one to whom the right is given.

The proposed classification is based upon distinctions wholly arbitrary, which do not classify voters according to age, sex, intelligence, reputation, property, morality, tax paying, or any other characteristic bearing relation to their present fitness to vote or to the good of society.

It depends upon a remote and wholly irrelevant circumstance, having no reasonable or just relation to the person's present fitness to vote, and is wholly arbitrary; and we submit that such arbitrary requirements are not within the contemplations of Section 2 of Article 1 of the Federal Constitution, pertaining to the qualifications of Federal electors.

The equal protection of the law, which shall not be denied, is a pledge of the protection of equal laws.

Yick Wo vs. Hopkins, 118 U. S. 356, 30 L. Ed. 226.

Missouri vs. Hopkins, 101 U. S. 22, 31.

Connolloy vs. Union Sewer Pipe Company, 184 U. S. 560, 46 L. Ed. 690.

State vs. Schlitz Brewing Company, 104 Tenn. 715-731, 78 Am. St. Rep. 941.

Nashville etc., Ry. Co., vs. Taylor, 86 Fed. 185.

Louisville etc. Ry. Co., vs. Railroad Co.,
19 Fed. 694.

G. C. & S. F. Ry. Co., vs Ellis, 165 U. S.
150, 41 L. Ed. 666.

In the last cited case it was held that classifications for legislative purposes must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without such laws.

As said in *A. T. & S. F. Ry. Co. vs. Matthews*, 174 U. S. 105, 43 L. Ed. 909: "Even where the selection (for classification) is not obviously arbitrary, if the discrimination is based upon matter which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed."

Of those possessing the general qualifications of electors in Oklahoma, one who, or whose ancestor, were poor, and disfranchised for lack of property on and prior to January 1st, 1866, for that reason alone is now presumed to be incompetent to vote, though he may now be worth millions of money, and may be meeting responsibilities and performing duties requiring the highest degree of intelligence; while another, now as poor as the ancestor whose poverty worked disfranchisement half a century ago, is now conclusively presumed to be competent to vote, because his ancestor was then a man of property or then lived in a state not requiring property qualifica-

tions for voting.

To have been poor more than half a century ago, so tainted the blood, that, through all changes of circumstances, all acquisitions of property, and knowledge and merit, all patriotic endeavor for human kind, all sacrifice for good, all worth, all character, such taint still touches the life and shadows the hope of the offspring, branding men of intelligence, culture, patriotism, success and noblest worth, with the imputation of degeneracy; while ex-convicts and criminals, and the scum of the earth can swarm from dives and waste places, conclusively presumed to be competent to vote, because their ancestors more than half a century ago were men of property or resided in states not requiring property qualifications of electors.

So many of our good men have started life poor that early poverty suggests no impediment to character, success or personal worth; and in a state like Oklahoma, the sentiments of whose people count character, intelligence and integrity, without regard to property or poverty, to be the essentials of genuine manhood, this notion of tainted blood flowing from the poverty of ancestors more than half a century ago, is urged as a reasonable support of presumptions as to fitness of electors.

Again, if one's ancestors were disfranchised on and before January 1, 1866, for crimes committed, he, and his offspring are forever presumed to be incompetent to vote, while the offspring, similarly situat-

ed, of all the criminals for the half century since that date, are conclusively presumed to be competent to do so.

Ex-convicts are eligible to high office in Oklahoma, while the noblest man amongst us is presumed to be incompetent to vote, if he was unfortunate enough in having bad ancestors, on and before January 1, 1866.

Loudly, it is proclaimed that this law visits the iniquities of the fathers upon the children unto the third and fourth generations; but such are only the iniquities existing on and prior to January 1, 1866; while the children of more than a half century of criminals since that date feel not the iniquities of the fathers.

This iniquity business was carefully timed to be visited upon as many negro children as possible, and upon as few white children as possible.

Again, if by accident of arrival, a foreign immigrant reached American shores before January 1, 1866, but not in time to become naturalized and entitled to vote by that date, and had no ancestor resident in a foreign nation, he and his offspring are presumed to be incompetent to vote, though he may have been naturalized on January 2, 1866, and his sons and grandsons may have been born in the United States, educated in our schools and universities, and may now be filling positions of responsibility and trust.

And notwithstanding his sons were born and educated in the United States, and boast of it, their native land, and well know and love its laws and institutions, and have all of the other qualifications of electors, yet they are presumed to be incompetent to vote, while an illiterate foreigner, but recently arrived and recently naturalized, who can scarcely speak the English language, who cannot read a sentence, nor write his name, is conclusively presumed to be competent to vote, if he possesses the other qualifications required.

And this accident of arrival, trifling in itself, imposes the fearful consequences of presumed unfitness to vote, fastening itself upon the offspring, whether they be presidents of colleges, ministers in our pulpits, farmers on our farms, merchants, mechanics, bankers, or in other lines of life. And this is called reasonable!

The vice of this classification does not depend wholly upon the fact that it is arbitrary; but, so far as practically all of the negroes are concerned, it gives distinguishing force to political disabilities removed by the fifteenth amendment.

If the state may impute former disabilities to voters generally, still this cannot be done when the application of such law to a voter depends upon disabilities removed by the fifteenth amendment; those disabilities were as though they never existed, and

they cannot distinguish such voter from the class given the right of suffrage without being able to read and write.

In Oklahoma, none except electors are eligible to jury service, and the exclusion from the franchise, of the class so discriminated against, excludes them and their class from jury service, leaving the ignorant white man and Indian, with all of his race prejudices, eligible to jury service and to determine the rights of negroes.

III.

This Oklahoma amendment is in conflict with the fifteenth amendment to the constitution of the United States.

(a) It is directed against the negro race.

(b) In its application to the negroes mentioned in the indictment, it impliedly incorporates and adopts by reference the constitution and laws of Kentucky and other states of which such negroes and their ancestors were natives on and prior to January 1, 1866, as determining their right to vote under the forms of government under which they lived on and prior to such date.

That is, it excludes Keel and the other negroes mentioned in the indictment from the privileged class of Oklahoma voters and thereby abridges their rights to vote, because of former and ancestral disabilities due to race and color; and it does this by impliedly

incorporating into the Oklahoma amendment, as a definition of rights, laws which confined the right of suffrage to white men.

It employs a date, January 1, 1866, on and prior to which but few negroes were allowed to vote, as the decisive date; and it is expressed in such terms as will disfranchise or abridge the suffrage rights of as many negroes as possible, and affect as few persons of other races as possible.

From the political history of the country, the Court knows that the date selected is the most effective for such purpose, and that no other consideration would point to that date as of any importance in such connection.

In the case of *William vs. Mississippi*, *supra*, it was held that the equal protection of the law is not denied to colored persons by a state constitution and laws which make no discrimination against the colored race in terms, but which grant a discretion to certain officers, which can be used to the abridgement of the rights of colored persons to vote and serve as jurors, when it is not shown that their actual administration is evil, but only that evil is possible under them.

In *Yick Wo vs. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Neal vs. Delaware*, 103 U. S. 370, 26 L. Ed. 567; *ex parte Virginia*, 100 U. S. 339; *Soon Hing vs. Crowley*, 113 U. S. 703; *Minn. vs. Barker*, 136 U. S. 312,

held, that a law fair on its face, but actually administered by the agents and officers of the state so as to accomplish the prohibited discrimination would be declared illegal.

We think the better distinction between the Williams case and the Yick Wo case is: In the Williams case the alleged arbitrary power there given was to be exercised upon proper considerations referred to in the law, leaving its wrongful administration, if any, the wrongs of the officers and not the wrong of the law; while in the Yick Wo case, the power given was arbitrary, and not by the law required to be exercised upon proper considerations. The Oklahoma amendment compels discrimination against negroes who or whose ancestors were slaves and disfranchised for racial reasons.

Though a law be fair on its face, if it confers arbitrary power not required to be exercised upon proper considerations, or if it necessitates, as does the Oklahoma amendment, or its administration actually accomplishes, as in the case at bar, unconstitutional results, the same will be held invalid.

The Mississippi law, by its terms, could be administered entirely within the limits of the constitutional rights of those affected by it, and as it referred to proper considerations upon which it should be exercised. it was constitutional.

The Oklahoma amendment is wholly unlike the

Mississippi law; the Oklahoma amendment expressly deprives electors of constitutional rights; and like the law in the Yick Wo case, it is obviously directed against a particular race, the negro, as such.

In the recent case of Qoung Wing vs. Kirkendall, 223 U. S. 59, 56 L. Ed., the court observed, incidentally:

"Another difficulty suggested by the statue is that it is impossible not to ask whether it is not aimed at the Chinese, which would be a discrimination that the constitution does not allow," citing the Yick Wo case.

When a law aimed at a race, affecting them prejudicially, in rights of suffrage, protected by the 15th amendment, or in their civil rights, protected by the fourteenth amendment, such law is unconstitutional.

In the Yick Wo case, the law, though with some unimportant exceptions, was directed against Chinese; as in the case at bar, the Oklahoma amendment is obviously directed against the negro race, though, in theory, it contemplates a few unimportant exceptions.

In the case of Ho Ah Kaw, vs. Nenan, 5 Sawy. 522, 12 Fed. Cas. No. 6546, the court said:

"Where an ordinance, though general in its terms, only operates upon a special race, sect, or class, it being universally understood that it is to be enforced

only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly. We may take notice of the limitations given to the general terms of an ordinance by its practical construction as a fact in its history, as we do in some cases that a law has become practically obsolete."

This refers to what was known as the queue ordinance in San Francisco, which required the sheriff to cut the hair of male prisoners confined for petty offenses to within one inch of the scalp.

It was operative upon all, but only applied and only offensive to the Chinese in removing their queues. It operated with special severity upon a class.

Now, it did not follow that all Chinese would wear queues, nor that all other men would wear short hair; but queues being characteristic of the Chinese as a race, and short hair being characteristic of other males, the obvious direction of the ordinance was against the Chinese race.

Disfranchisement was characteristic of the negro race on and prior to January 1, 1866, and not characteristic of any other race, and it is obvious that such date was selected because the law would thereby operate upon such legal condition of the negro race; and it makes no difference that there may be few unimportant exceptions; it remains that the law operates

with special severity against the negro race, as it was intended to do.

It is not the purpose of the fifteenth amendment to permit legislation obviously directed against the negro race simply because it should be so framed as to admit of a few exceptions to its universal and exclusive application thereto. Legislation contrary to the policy and spirit of the amendment is contrary to the amendment.

The law exempts practically all naturalized citizens from the educational test.

Every foreign white man coming to the United States since January 1, 1866, on that date either resided or had an ancestor residing in a foreign nation; and he and his descendants are exempt. It is probable that practically all such who were in the United States on January 1, 1866, and who were not then naturalized, had ancestors residing in some foreign nation; and such and his descendants would be exempt. Besides, such foreigner would not be a citizen unless he has been naturalized since.

Nor was it the intention to require this test of white foreign born citizens.

In the case at bar the witness Larson (178), a white man, born in Denmark (R. 179), was challenged by Beal, one of the plaintiffs in error, and answering that his ancestors had voted or lived under an electoral form of government prior to 1866, he was per-

mitted to vote (R. 180) without trouble or confusion (R. 191-192).

Beal had said that white men could qualify through their ancestors (R. 161) and would not have to stand the test.

But the accused refused to take the statements or affidavits of intelligent, responsible colored men like Stephenson, Curren, Fort and J. Hilyard, the latter a graduate of Allcorn A. & M. College, Miss., Lincoln University, Penn., and Bryan & Stratton, Buffalo, and who was then principal of the Cimarron Industrial Institute, a negro industrial school, in the same township. (R. 145-6).

The accused knew Hilyard, and appeared to know that he was engaged in educational work. Beal advised him that they had not received the qualifying affidavits; and being told that Hilyard could read and write any section of the constitution, Beal engaged him in conversation about his ancestors, and other irrelevant matters, asking if his grandfather could read, until Hilyard was ordered out without being given an opportunity to read or write. (R. 145-52).

There were about 86 colored voters in the precinct (61), and it appears that not to exceed 4 succeeded in voting; the obvious purpose being to harrass, intimidate and annoy these colored men to prevent them from voting.

They would not accept qualifying affidavits from

colored voters (34), nor permit them to make such affidavits (R. 107-114-118); though they had affidavits there, they refused to allow colored voters to use them (R. 90); and to Hilyard they denied having such affidavits (R. 148); and colored voters were turned out without being allowed to vote or to read or write any section of the constitution. (R. 64-99-132-148-149). Beal held that negroes when challenged could not qualify by affidavits. (R. 296-303).

In the morning Sam Fort had told them there were many out there, and on account of time, he wanted to make an affidavit, which was refused (90).

One J. J. Small went through the reading and writing process, in the confusion and hubbubb of others passing and calling around him, using a writing of small print, consuming about an hour, during which time no other colored voters were admitted. Beal subjected him to closest scrutiny, and then rejected his vote because he omitted some letters and words while white voters during all of this severe attention to Small, were permitted to pass on oral statements as to their qualifications (140). Under such test not more than ten of the 86 colored voters could have been admitted during the day, had they submitted to every test.

In the afternoon before the polls closed, and while there was yet time for some to vote, a number of these colored voters, upon the advice of some white men who came from Kingfisher, took a copy of the

constitution and went to the polling place when no other voters were engaging the attention of the officers, and asked to prove their qualifications by reading and writing sections of the constitution, and to be permitted to vote, which was refused them for the trifling reason that they had been in there before; and on account of which offer the accused made bold show of their authority; Guinn, who was a deputy sheriff, threatening, at the instance of Beal, to make arrests. (39-40, 64, 65, 75-80, 90-92, 99-100, 104, 114, 115, 132-133, 154-159).

It appears that the plaintiffs in error, being appointed officers of this election, started out to find some one who could advise them how to disfranchise the negro voters of the precinct.

About two weeks before election Mr. Beal attended a meeting of inspectors at Kingfisher (R. 287), at which George Bowman, legal adviser of the County Election Board, was present (288).

At a meeting at Hennessey, probably on Saturday before the election, Tuesday, Mr. Beal being present, a letter from Mr. Boynton, Chairman of the County Election Board was considered (257), the effect of which was that challenged voters should be permitted to prove their qualifications by affidavits.

It appears that a Mr. Lane and a Mr. Gray were then sent to see the Governor, who gave them a letter which Mr. Lane brought back, and which, on

Monday before the election on Tuesday, at a meeting which Mr. Beal attended, was considered (R. 256) and which Mr. Beal heard read (R. 301-303); which letter is exhibit I, (R. 258), in which letter (R. 262), the Governor refers them to certain sections of the law, as a means of advising the election officers as to the qualifications of the voters; which law (R. 262) authorized the challenged voter to prove his qualifications by affidavit.

It appears also, that at the Monday meeting before the election (R. 255), they considered a further letter from Mr. Boynton, Chairman of the County Board, reciting a letter from George L. Bowman, legal adviser of the County Board, to the effect that negroes could prove their qualifications by affidavit. Mr. Bowman was Chairman of the County Democratic Committee. (R. 84), but the accused would not allow negroes to make such proof by affidavits.

Mr. Guinn was at the meeting at Hennessey, probably the Saturday meeting, when the enforcement of the Oklahoma amendment was discussed. (R. 283-5).

He was Deputy Sheriff of the County, Democratic Committeeman for that Precinct, and Judge of the Election Board.

That it was understood that this law was directed against the negroes only, and should not be enforced against white men, appears from the evidence in this case.

On the 4th or 5th of November before the election, Mr. Beal and the witness Stephenson were together present with Mr. Boynton of the County Board, and discussed the Oklahoma amendment, and Mr. Boynton advised them, suggesting a fair administration of the law (R. 81-82); and it appears that some argument resulted from Mr. Beal's suggestion of a technical interpretation of it; whereupon Mr. Boynton suggested that such technical enforcement of it would disqualify white men and Mr. Beal said: "The white men wouldn't have to (would not have to take the test), because their ancestors had been voters, by being voters prior to 1866." (R. 161).

It is true that but few, if any, white men in Oklahoma are required to be able to read and write.

As before suggested, the provision relating to foreign voters is such that practically all foreign-born citizens and their descendants are exempt from the test, and it does not appear that it has been enforced against any.

That this foreign clause was carefully framed to the disadvantage of the negro, so by no possibility could he claim rights through a foreign ancestor, is apparent from the use of the words "foreign nation" instead of foreign country, or some other expression of like meaning; because the African tribes have never been recognized in international law as nations. 1 Moore's International Law Digest 16.

As to native-born white citizens, who or whose ancestors were not entitled to vote under some form of government on or prior to January 1, 1866, or who did not have an ancestor in a foreign nation on that date, there are probably none in Oklahoma, or if so, the fact is probably not known.

The descendant of a line of native-born white Americans can well claim such an exemption through a remote ancestor who was entitled to vote prior to January 1, 1866, if his grandfather was in the penitentiary on that day.

This clause is carefully worded so that, in most instances, a white man can claim exemption through an ancestor who lived in a foreign nation on January 1, 1866, if he cannot claim through a father or grandfather who arrived here before but was not naturalized; or through some remote ancestor entitled to vote under some form of government or in some of the states prior to January 1, 1866, if the ancestor of that date was, for any cause, disfranchised.

It was not designed that this law should be enforced against any white man, and it is so worded that no challenger can disprove a white man's right to the exemption.

He is a white man, having the whole field of native and foreign ancestors to claim through, and those who cannot claim an exemption through some of these are so few as not to be known, and are but trif-

ling and unimportant exceptions. Recurring to the voters then resident in Georgia, the white men then and there disfranchised for personal fault, and their descendants can claim exemptions from the educational test in Oklahoma under some ancestor entitled to vote prior to January 1, 1866; and thus the iniquity of the parents visited upon children, except upon negro children, disappears.

The whole thing is so adroitly worded that no one except negroes need be able to read and write, except, possibly a few Indians hereinafter mentioned. So, by incorporating the former Georgia law into the Oklahoma constitution, it affects only the negro who and whose ancestors formerly resided in Georgia; for the descendants of a white man who was then disfranchised, and of such disfranchised white man himself, to claim through a still earlier ancestor, exempts all such Georgia white men from the educational test.

We have a few Indians, other than Osages and members of the five civilized tribes, who, because of their former mode of life, not being members of an organized government, are probably discriminated against; but this does not affect the question, since they were not residents of any of the discriminating states on January 1, 1866.

This law is a menace to the people of Oklahoma. It makes the rights of many thousand voters depend upon the will of the election officers. The election

machine can permit negroes, who will vote their way, to vote, and can disfranchise practically all others. Such power in the hands of an election machine is a public menace.

The case of *ex parte Snow*, 113 Pac. 1069, was decided by the Criminal Court of Appeals, after the election to which the charge in the case at bar relates.

That case holds that the election officers may not subject the voter to an unreasonable test, but may allow him to vote upon his known ability to read and write, or upon affidavits to that effect, or upon a reasonable test of reading and writing.

But even this moderate construction of the law shows a rank denial of the equal protection of the law, with respect to the right of a qualified elector to vote for Congressmen.

While all other electors may prove their qualifications by affidavits which the election officers must accept, persons challenged under this amendment cannot have that right, but can vote only upon the truth of the fact of qualifications, in the establishment of which the election officers may reject the character of proof made sufficient in other instances.

If a man is challenged under the Oklahoma amendment, he can neither prove his ability to read and write, nor that his ancestors were foreigners or entitled to vote on January 1, 1866, by affidavit, but he is wholly dependent upon the arbitrary power of

the election board, and he is denied the benefit of the same kind of proof which is sufficient for other people.

This completely disfranchises those negroes who cannot read and write, though their ancestors were voters, and abridges the rights of all others. As a legislative interpretation of this law, we call attention to a subsequent act of the state legislature of March 18, 1911, Session Laws of Oklahoma 1910-11, page 232, providing that "if a person be challenged on the ground that he is not able to read and write any section of the constitution, and was not a legal voter under any form of government on January 1, 1866, or one whose ancestor was not a legal voter on said date, before being permitted to make the affidavit required below (the affidavit as to the qualifications generally) he shall be required to read and write any section of the constitution."

This provision is a legislative interpretation of the Oklahoma amendment.

Voters challenged for other causes may prove the whole of their qualifications by affidavit, but when challenged under this amendment the negro is required, though his ancestors were electors on January 1, 1866, to submit to the educational test before he is permitted to prove that he is not subject to it.

This Oklahoma amendment, in its application to negro citizens who or whose ancestors were slaves,

and on and prior to January 1, 1866 disfranchised because of race, color and previous condition of servitude, places their present disabilities upon disabilities removed by the fifteenth amendment to the constitution of the United States; and makes such removed disabilities the basis of state action prejudicial to them, thereby nullifying the spirit of the fifteenth amendment.

And, by making the present exemption to depend upon a prior legal right without otherwise identifying those entitled to such prior legal rights, it necessarily refers to those prior laws and constitutions which identify the persons entitled to such prior rights, and thereby incorporates them into the Oklahoma amendment, as a part of itself; by which prior laws and constitutions applicable to Keel and the other negroes mentioned in the indictment, the electoral franchise was confined to white men.

Therefore, the Oklahoma amendment impliedly abridges the right of suffrage of such negroes on account of their race and color.

That is, the amendment creates a privileged class of voters exempt from the requirement of ability to read and write, to which class the electors named in the indictment are ineligible, because the test of eligibility is to them and their ancestors a race test, which, because of their race and color, they cannot meet; and as to such electors this amendment im-

plies as a part of itself the laws of their and their ancestors residence on and prior to January 1, 1866, which disfranchised them and their ancestors solely on account of their race and color; and which, being an implied part of the Oklahoma amendment, brings such amendment in conflict with the fifteenth amendment to the constitution of the United States.

This Oklahoma amendment is not complete in itself, in that it does not say who were "entitled to vote under any form of government on or prior to January 1, 1866."

It refers not to instances of conduct; it does not say who voted under any form of government; but it refers to a legal right, the determination of which necessarily involves, as a rule of classification, the election laws in the state or government under which one or his ancestors resided on or prior to January 1, 1866.

The privileged class is subdivided into those who, and whose ancestors, were entitled to vote under some form of government on or prior to January 1, 1866, and those who, and whose ancestors, were, on such date, residents in a foreign nation. Residence in a foreign nation was a fact which may be established without reference to any law, but the right to vote under some form of government was a legal right, the existence of which cannot be ascertained except by reference to the law then determining the right to vote,

which prior law is, by reference adopted and imported into the Oklahoma amendment, as the definition of the prior right to vote, upon which depends the privilege of the Oklahoma amendment.

Endlich on Interpretation of Statutes, Sec. 492.

In the case of *Nunnes vs. Wellish*, 75 Ky. (12 Bush) 363, the court decided that where a former general law regulating mechanics liens is superseded by a local law, and all laws in conflict with the later law are repealed; as the former law protected innocent purchasers, and such innocent purchasers were not mentioned in the later law, the former law applicable to innocent purchasers, became incorporated into and made a part of the later law, and innocent purchasers would be protected. In the opinion the court says:

"If one statute refers to another for the power given by the former, the statute referred to is to be considered as incorporated into the one making the reference."

The same principle obtains here. The Oklahoma amendment refers to the election laws of the states on and prior to January 1, 1866, for the prior qualifications entitling the electors to the present privilege; and the laws, so referred to, are to be considered as incorporated into the Oklahoma amendment.

The proper construction is this: The Oklahoma amendment divides voters into two classes and con-

fers upon one class the privilege of voting without being able to read and write; and as to those who, and whose ancestors, are or were native Americans, the electoral qualifications on or prior to January 1, 1866, are conditions upon which the privilege is given. This is equivalent to saying, that those who, or whose ancestors, had such previous and present qualifications may enjoy such privilege; while those having the present qualifications, but who, and whose ancestors, lacked the previous qualifications, must be able to read and write.

This, by implication, incorporates into the Oklahoma amendment all of the previous election laws of the states as provisions prescribing such previous qualifications; and when any of such implied laws confined the previous right to vote to white men, it brings that unconstitutional element into the Oklahoma amendment.

The supreme court of Illinois, in the case of *Turney vs. Wilton*, 36 Ill. 385, where was in question the power of certain trustees derived from another law to which reference was made by the law creating the trustee's office, say:

"As the former statute was referred to as giving certain powers, such other statute was to be considered and treated as if incorporated into the latter act, and made a part thereof, for the purpose of determining the powers of the trustees, whose powers were conferred by the former law."

Sutherland on Statutory Construction, 2nd Ed.

Sec. 443 (283) says:

"All consistent statutes which can stand together, though enacted at different dates, relating to the same subject matter and hence briefly called statutes in *pari materia* are treated perspectively, and construed together as though they constituted one act. This is true whether the acts relating to the same subject matter were passed at different dates, separated by long intervals, or short intervals, at the same session or on the same day. They are all to be compared, harmonized if possible, and if not susceptible of a construction which will make all their provisions harmonize, *they are made to operate together so far as possible consistently with the evident intent of the last enactment.*"

Endlich on Interpretation of Statutes, Sec. 43, says:

"Where there are earlier acts relating to the same subject, the survey must extend to them; for all are, for the purpose of construction, considered as forming one homogenous and consistent body of law, and each of them may explain and elucidate every other part of the common system to which it belongs."

Black on Interpretation of Laws, Sec. 86, says:

"Statutes in *pari materia* are to be construed together, each legislative act is to be interpreted with reference to other acts relating to the same matter or the same subject."

In Moores case, 10 Ct. Clms. 375, is the following syllabus:

"The abandoned or captured property act (12 St. L. 820) and the act in addition etc. (13 Stat. L. 375) are in *pari materia* and the remedy given by the former is effective for the rights given by the latter. Hence a suit may be maintained for the rents of abandoned buildings collected by treasury agents and paid into the treasury, though the former statute relates only to personal property, and the latter, (which authorizes the seizing and renting of abandoned build-

ings) does not in terms give to the owner a right of action for the moneys collected."

The court saying:

"The act of 1864 is in addition to the act of 1863. It added another class of property to that which the agents appointed by the secretary of the treasury were to take possession of. The two acts, being on the same subject, must be construed together, and when so construed the right of action given in the first applies to the second precisely the same as though it had been repeated therein, and gives to loyal owners the right to recover the proceeds of rents collected from abandoned lands paid into the treasury by such agents."

In *Rexford vs. Knight*, 15 Barb. (N. Y.) 627, it was held that the state became seized of the same estate in lands taken under the act of April 1819, for the continuation of the Erie Canal as it had in those appropriated by virtue of the previous act, April 1817, for the construction of such canal, although the title of the state to lands was expressly provided for only in the act first passed.

In *Rogers & Magee vs. Bradshaw*, 20 Johns. 744, under Canal Act of 1817, empowering commissioners to take land necessary for prosecution of canal etc., and providing compensation for injury to individuals and prescribing procedure, and the act of 1820 providing for an engineer to alter public roads when necessary in connection with canal construction, but containing no provision for compensation to owners of land damaged by such alteration, the supreme court having decided that this was a serious omission from

the last act, was reversed by the court of errors, the chancellor saying:

"But the court below considered the absence of any provision in the act of 1820, for compensation to the owner of the land, for damages sustained by any alteration of the road, as a still more serious difficulty in the application of the statute in this case. It appears to me to be a sufficient answer to this objection, that the act of 1817 has provided the remedy for compensation for every injury committed by the commissioners in the execution of their powers; and when new powers are added (though I apprehend, the act of 1820 did not, on this point, confer any power not before existing) the same remedy would apply. All statutes, said Lord Mansfield, (Doug. 30) which are in *pari materia*, are to be taken together, as if they were one law; and in many instances, a remedy provided by one statute will be extended to cases arising on the same subject matter under a subsequent statute. The act of 1820 was only specification of the course of duty of the commissioners in a particular case; and it would have been quite unnecessary, in my humble opinion, quite idle, to have provided, that the general remedy for all damages occasioned by the exercise of any part of the whole mass of undefined power given by the act of 1817, should apply to a portion of that power exerted in the particular manner provided by the act of 1820."

In the City of Louisville vs. Commonwealth, 9 Dana (Ky.) 75, certain series of acts required payment by the City of Louisville of various sums into the state treasury.

The court says:

"The act of 1836 certainly gave to the general court jurisdiction as to the sums required to be paid by that act and by the prior act of 1835. The act of 1837, requiring the additional payment of fifteen hundred dollars is silent as to the mode of enforcing the payment. But, as this latter requisition is merely supplemental or additional, we are of the opinion that the

remedy prescribed for enforcing the other payments should be equally applicable to this also."

In the case of *United States vs. Collier*, 3 Blatch. 325, Fed. Cas. No. 14833, where the right of a collector of customs to certain fees was in question, the law under which he was paid being as follows:

"(4) The collector of such district shall receive a compensation of \$1500.00 per annum, and all the fees and commissions allowed by law."

The court say:

"It is the duty of the court to look to all revenue statutes bearing on that subject, of similar import, in order to determine the will of the legislature in passing the act. * * * The 4th section of the act of 1849 is to be considered and read as if the fees and commissions enumerated by the acts of 1793 and 1799 had been repeated in express terms in that section; and the grant of compensation would then be direct and positive, both of the fixed sum of \$1500.00 and of those specified fees and commissions. The general reference is equivalent to, and of the same effect as, the reiteration of the particulars, and that being certain in law which may be reduced to a certainty; and the tariffs of fees and commissions being fixed, the collection of them would render this branch of compensation equally determinate with the other."

In *Territory vs. Luna*, (N. M.) 3 Pac. 244, the court say:

"The general system of legislation upon the subject matter may be taken into consideration in order to aid the construction of a statute relating to the same subject; and all statutes in *pari materia*, whether they be repealed or unrepealed, may be considered with the same view."

In *Bank for Savings vs. Field*, 3 Wall. 495-514, 18 L. Ed. 207, the rule is announced:

"Since the passage of the act, however, the pro-

viso has been stricken out, and the palpable effect of the repeal has been to leave the body of the act in full force and operation, without any such qualifications as were imposed by the proviso. Although the proviso is repealed, still it is proper to resort to it as well as the proviso of the 79th section as affording a legislative exponent of what is meant by the phrase, 'engaged in the business of banking,' as employed in the first section under consideration."

In *Viterbo vs. Friedlander*, 120 U. S. 707-737, 30 L. Ed. 776 at 782, the doctrine announced in the former case is affirmed, the court saying:

"But it is a familiar canon of interpretation that all former statutes on the same subject, whether repealed or unrepealed, may be considered in construing the provisions that remain in force."

In *Shull vs. Bartin*, 79 N. W. 732, the court passed upon a statute requiring sureties on replevin bond, when objected to by the other party, to justify as sureties for bail on arrest. The statute referred to—that applying to the manner of sureties justifying for bail on arrest—had been repealed, and it was contended, therefore, that there was no statute governing the manner in which sureties on replevin bonds should justify, when objected to by the opposite party.

It was held by the court that there had been such a statute as the one referred to in existence at the time of the passage of the statute governing the manner in which sureties on replevin bonds should justify, and that such statutes was by implication made a part of the latter statute, and therefore, governed the manner in which sureties on replevin bonds should

justify, and that such statutes was by implication made a part of the latter statute, and therefore, governed the manner in which sureties on replevin bonds should justify.

In *Welty vs. United States*, (Okla.) 76 Pac. 121, the court states the doctrine that, when words have a fixed and settled meaning at common law, no definition thereof is needed by the statute prescribing the punishment therefor, but reference will be made to the common law to ascertain their meaning.

The court in the case of *United States vs. Oregon & C. Ry. Co.*, 133 Fed. 956, says:

"But it is a rule of statutory construction that statutes having similar objects are to be construed alike, and so the construction which has been placed upon acts or similar subjects, even though the language be different, should be referred to."

In *United States vs. Jessup*, 15 Fed. 790, the court says:

"Amendatory acts of Congress are to be construed as enacted with reference to the existing system of laws on the subject to which they pertain, and if possible, to be construed as part of one system."

In *Chauncey vs. Dike Bros.* 119 Fed. 10, the court says:

"Previous legislative enactments, and definitions of terms therein contained, that have been repealed, may also be consulted for the purpose of ascertaining what is meant by like terms used in subsequent statutes."

In *Moses vs. Bidwell*, 130 Fed. 334, the court held that where a subsequent act was passed to remedy

a defect in a law which had been construed by a court, such subsequent act was to be construed as a part of the former act.

In *Postal Telegraph Cable Co. vs. Southern Railway Co.*, 89 Fed. 190, the court held, that where a law prescribes a mode in which a petition for condemnation is to be filed, and the procedure thereafter is to be the same as provided for railways, the railway act, for such procedure as is necessary after the filing of the petition, becomes a part of such later law as though written therein in so many words, and an amendment of the railway law at a later date does not change the law as incorporated in the law for condemnation by telegraph companies.

The supreme court of the United States in the case of *United States vs. Le Bris*, 121 U. S. 278-280, 30 L. Ed. 946, states the rule as follows:

"Where a term is defined by statute, and later the defining section is repealed, to find out the meaning of such term recourse is properly had to the repealed section as though it were a part of the law, and is by implication made a part thereof."

In the case of *ex parte Crow Dog*, 109 U. S. 556-572, 27 L. Ed. 1030, a case mentioning that the term "Indian Country" had been defined in an earlier section which had since been repealed, other parts of the same act remaining in force, Held, proper to refer to the repealed section to learn what was meant by the term "Indian Country," in order that a prosecution under the remaining sections should not be defeated.

The court say:

"Nevertheless, although the section of the act of 1834 containing the definition of that date has been repealed, it is not to be regarded as never adopted, but may be referred to in connection with the provisions of its original context which remains in force, any may be considered in connection with the changes which have taken place in our condition, with a view of determining from time to time, what must be regarded as Indian Country where it is spoken of in the statutes. It is an admitted rule in the interpretation of statutes, that clauses which have been repealed may still be considered in construing the provisions that remain in force."

The same doctrine is announced in the case of *Flanders vs. Town of Merrimack*, et al, 48 Wis. 567, 4 N. W. 741, a case very much in point. The court say:

"A single question remains to be considered. Sec. 1210 B. R. S., which corresponds with Sec. 5 of the laws of 1878. The former section refers to Sec. 1210 A. in these words: 'In all actions hereafter tried on issue joined, in any of the courts of this state, in which it shall be sought by either party to set aside or avoid, in whole or in part, any assessment etc., for any of the causes mentioned in Sec. 1210 A. of these statutes, etc.' The act of 1879 repeals Section 1210 A. One of the counsel argues that since its repeal no resort can be made to it to ascertain the scope of Sec. 1210 B. The point is not well taken. Although Sec. 1210 A. is not a law and no longer has any force as law, it was not annihilated by its repeal, and a reference to it in the following section is just as effectual as ever it was to determine the cases to which the latter section applies."

That which is implied in a law is as much a part thereof as that which is expressed:

United States vs. Babbitt, 1 Black 61.
Gelpecke vs. Dubuque, 1 Wall. 175, 220.
Wilson Co. vs Third National Bank, 103
U. S. 770.

Now, the Oklahoma amendment creates two classes of voters; one class privileged, in virtue of power given by former law, to vote without being able to read and write; the other, because of disabilities imposed by former law, required to be able to read and write before they may vote; and the eligibility of Keel and others mentioned in the indictment is to be determined under such classification by former laws which disfranchised them and their ancestors because of race and color. These former laws are as much a part of the Oklahoma amendment as if written out in full therein; and wherever they limited the suffrage to white men, they limit the privilege of the Oklahoma amendment to white men, and make negroes formerly subject to such laws ineligible to the Oklahoma privilege on account of race and color. When privileges are conferred upon a class to which negroes are ineligible because of race and color, such negroes are discriminated against in terms because of race and color.

Strauder vs. West Virginia, 100 U. S. 305.

Then, it follows, that this Oklahoma amendment, in its application to the electors mentioned in this indictment, refers to and adopts the laws of the states of residence of these electors and of their ancestors on and prior to January 1, 1866, in all of which states the right to vote was then confined to the white race, and these electors and their ancestors were disfran-

chised because of their race, color and previous condition of servitude. Therefore, the decisive element of the Oklahoma amendment as to these electors, are former laws, violative of the fifteenth amendment, without which the Oklahoma amendment would be void for uncertainty; and it is such former laws which determine the classification.

It is not possible that Oklahoma can perpetrate now, since the adoption of the fifteenth amendment to the constitution of the United States, all of the old election laws based upon race distinction, to destroy which was the purpose of the fifteenth amendment; and apply the same unconstitutional laws to negro citizens of Oklahoma, who and whose ancestors resided in such discriminating states on and prior to January 1, 1866.

That is what this Oklahoma amendment attempts, in a disguised form, but just as effectively as if the provisions of race discrimination were set out in full in the amendment.

In legal effect, this Oklahoma amendment, touching electors otherwise qualified to vote in this state, says, that all white men, who, or whose ancestors, on and prior to January 1, 1866, resided in the state of Georgia, or any other discriminating state, and were entitled to vote under the laws of that government, may vote in Oklahoma without being able to read and write; while all white men who and whose ancestors

resided there, but to whom the right of suffrage was then and at all times prior thereto denied because of lack of property, mode of life, crime, or other personal fault, none of which causes were racial, and all negroes who, and whose ancestors, resided there, though they may have had all of the qualifications of electors except that of race, must be able to read and write in Oklahoma.

It has been suggested that such a law would be valid in its racial discrimination because it is broad enough to include others discriminated against for other than racial reasons.

The prohibition of the fifteenth amendment is against racial discriminations; and no law can discriminate against one for racial reasons, because it operates against others for other reasons.

The presence in or absence from the class discriminated against, of others than negroes, if the classification were made upon considerations pertaining to some circumstance or rule which did not in itself determine in part the classification according to race, would be material in construing such a law; but where a circumstance or rule referred to as in this case, is decisive of the classification, and itself necessitates that some, on account of race and color, be placed in the class discriminated against, such is a discrimination on account of race or color as to all those so affected for such reason, notwithstanding

others may be likewise affected for other reasons.

Thus, admission to the privileged class of electors in Oklahoma depends upon the possession of a right denied such a negro because of his race and color; that is, such a negro is ineligible to the privileged class because of a requirement which excludes him solely because of his race and color.

It is true that this requirement excludes from the privileged class those white men, who and whose ancestors were formerly disfranchised for lack of property, or personal fault; but this is still a discrimination against the negro, since he, solely because of his race, although he may have possessed the requisite property and merit, was denied the advantage of such right which he did not forfeit for personal fault, or lack of property; while white men, similarly situated, enjoyed such privilege of the electoral franchise.

In addition to the requirements of white men, race was imposed as an impossible barrier to the negro, and in this added hardship was he discriminated against even in comparison with a white men disfranchised for personal fault or lack of property. It may be thought that such colored elector or his ancestor could have avoided these consequences by residing at that time in some foreign nation or state that did not so discriminate; but to require that he should have so resided in some special place, when white men were not so required, is discriminating against the negro as such.

Whatever the attempt at reason, the fact remains that the negro cannot enter the privileged class of electors because of a requirement which excludes him for racial reasons, notwithstanding all other qualifications.

As to the qualifications of electors who and whose ancestors then resided in Georgia, the Oklahoma amendment adopts the then election laws of Georgia (and what is true of the application of this amendment to voters coming from Georgia, is true of its application to those from every such discriminating state) with the modification, that those then excluded absolutely are here required to be able to read and write; an abridgement of the right to vote, as much in violation of the fifteenth amendment as an absolute denial of the right could be. If this abridgement of the right can stand, there is nothing to prevent the absolute disfranchisement of all negroes who were disfranchised before the adoption of the fifteenth amendment, and their descendants.

The Oklahoma amendment is an exercise of a power which, if it exists at all, can be used to abrogate the fifteenth amendment, by theoretically including a few white voters, unimportant exceptions and additions, in the result.

It may be insisted, and that appears to be the principle underlying the decision of the Oklahoma supreme court, that since on and prior to January 1,

1866, there were a few negroes in a few states that had the right to vote and there were a few white men in several of the states who were disfranchised for personal faults or lack of property, and some Indians were not voters because of their mode of life, the discrimination of the Oklahoma amendment is not identical with race lines, and is, therefore, not a discrimination on account of race and color.

If this amendment abridges the right of a single negro because of race or color, it is unconstitutional as to him.

It has never been thought that a law disfranchising one class on account of race or color, may be sustained against them because it disfranchises others also because of personal faults, mode of life, or lack of property. It is a disparagement of the fifteenth amendment to make a political disability, removed by it, the basis of another prejudicial law.

Were it admitted that the state may abridge the present electoral franchise because of past disfranchisement, still the state cannot give force to a previous disfranchisement for disabilities removed by the fifteenth amendment, that would distinguish the person so affected from one then entitled to vote; for to do so would be to perpetuate a consequence of those very disabilities the amendment was designed to remove.

To give distinguishing force, in aid of a present classification, to a personal status, personal disfran-

chisement, removed by the fifteenth amendment, is to disparage and limit the effect of such amendment, and cannot be done.

Such previous status cannot be imputed to a negro as a basis of prejudicial legislation and as separating him from and making him ineligible to a right of suffrage enjoyed by a class of citizens otherwise similarly situated.

In *Jones vs. Board vs. Registrars*, 56 Miss. 766, 31 Am. Rep. 385, the court, speaking of the effect of a presidential pardon in restoring an offender to his right to vote, said:

"In contemplation of law, it so far blots out the offense, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights."

In *ex parte Garland*, 4 Wall. 333, held, to require a test oath after the presidential pardon, would be to avoid such pardon.

We submit, to impute to one the fact of such previous conviction, though not for the purpose of imposing a direct penalty or disability on him as a person, but merely to distinguish and exclude him from a class entitled to the franchise, would be to avoid, in part, the pardon. To give to the fact of conviction a distinguishing force in subsequent legislation, notwithstanding the pardon, would be to limit the force of the pardon.

The Mississippi court observed the principle that,

after pardon, the prior fact of conviction could have no distinguishing force, though, no doubt, persons convicted for crimes not pardoned were by that fact legally distinguished from those entitled to vote.

Applying the same principle to those formerly disfranchised under the laws of Georgia; some for personal fault and some for race and color. The fifteenth amendment abrogated the disfranchisement on account of race and color, together with all its force and consequences; and while it may be that such previous disfranchisement for personal fault may now be employed to distinguish persons affected thereby from those entitled to vote without being able to read and write, such distinguishing force cannot be attached to those disfranchisements abrogated by the fifteenth amendment, without avoiding in part and limiting the force of such amendment, contrary to its letter, spirit and purpose. We submit that disabilities removed by such amendment are as if they had never existed, and that they cannot be given a force which distinguish the rights of citizens under any present legislation.

We cannot enforce in Oklahoma, against a negro, as this amendment attempts, as the test of eligibility to the privileged class of voters, a law which disfranchise him or his ancestors because of race or color, merely because the former disfranchisement of a white man for other than racial reasons is made a cause of abridgement of a present right.

The two cases are radically different. The negro's former disfranchisement was the effect of a now prohibited cause; and to such cause we would be giving distinguishing force were we to employ its effect as a present test of eligibility to a right, while the white man's former disfranchisement was not the effect of a prohibited cause.

A prohibition of the abridgement of suffrage on account of race and color, is a prohibition of such abridgement on account of the former effects of race and color, because such abridgement, through such effects, is related to the original cause, and is on account of such race and color.

To legislate with respect to the effects of a cause is to legislate with reference to the cause itself, because the effect is an identifying consequence of the cause, and carries the force of such legislation back upon the cause itself; as, taxation upon the proceeds of real estate is taxation upon the real estate itself within the meaning of a law protecting such real estate. And to abridge a negro's present right to vote because he was formerly disfranchised, when that disfranchisement was on account of race and color, is a present abridgement on account of race and color. It prejudices him because of former racial disabilities, and the state cannot do indirectly what it cannot do directly.

Bailey vs. Alabama, 219 U. S. 219, 55 L. Ed. 191-204.

Tax upon income of real estate is a tax upon the real estate itself, likewise a tax upon the income of bonds is a tax upon the bonds, *Pollock vs. Farmers L. & T. Co.*, 157 U. S. 578, 39, L. Ed. 818; *Weston vs. Charleston*, 2 Pet. 449, 7 L. Ed. 481; tax upon the occupation of an importer is a tax upon imports and therefore void, *Brown vs. Maryland*, 12 Wheat. 419, 444, 6 L. Ed. 678, 687; the income from an official position can not be taxed if the office itself is exempt, *Dobbons vs. Erie Co. Com.* 16 Pet. 435, 10 L. Ed. 1022; duty on a bill of lading is the same thing as duty on the article which it presents, *Almy vs. California*, 24 How. 169, 16 L. Ed. 644; a tax upon the amount of sales of goods made by an auctioneer is a tax upon the goods themselves, *Cook vs. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015.

The foregoing cases show that a requirement based upon the resultant of a prior state, is on account of such prior state.

"The substance, and not the shadow, determines the validity of the exercise of power." *Postal Tel. Co. vs. Adams*, 155 U. S. 688.

In *Henderson vs. Mayor*, 92 U. S. 268, in construing a statute requiring the masters of vessels to give bond to indemnify the city against charges on account of passengers landed, with the right to commute the same by paying \$150.00 for each passenger, the court said:

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of the statute as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers as if collected from them, or a tax upon the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the Passenger Cases."

It was insisted that this was a police regulation to enable the city to escape being charged with the support of paupers so landed, the masters having the option to give bond in each case in the sum of \$300.00 to indemnify the city against such charges, and thereby escape the \$150.00 cash payment.

But the court looked through the form and saw that it was the purpose of the statute to require the cash payments; that is, the natural and reasonable effects of the statute would be that masters would not want to give such bonds and thereby obligate themselves to meet future charges when, instead, they could require each passenger to advance \$150.00 on landing. That the requirements of the statute were in the alternative, one of which did not impose a tax upon the passenger or the vessel, but the other, which it was the most natural and reasonable for the masters to follow, did impose such tax.

In *Brown vs. Maryland*, *supra*, the court said:

"But if it should be proved that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article,

but on the person (state license required of persons selling imported goods at wholesale or in the original package).

"The state, it is said, may impose occupation taxes and this is nothing more. It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax upon the article itself."

The law may be fair on its face, yet if it accomplishes or necessitates the accomplishment of the things prohibited by the amendments of the constitution of the United States, it is unconstitutional.

Yick Wo vs. Hopkins, 118 U. S. 356, 30 L. Ed. 220.

Neal vs. Delaware, 103 U. S. 370, 26 L. Ed. 567.

Ex parte Virginia, 100 U. S. 339.

Soon Hing vs. Crowley, 113 U. S. 703.

Minnesota vs. Barber, 136 U. S. 313.

In the case of Maxwell vs. Dow, 176 U. S. 602, 44 L. Ed. 605, the court, in speaking of construing a constitutional amendment, said:

"The safe way is to read its language in connection with the known condition of affairs, out of which the occasion for its adoption may have arisen, and then to construe it, if there be any doubtful expression, in a way as far as reasonably possible, to forward the known purpose or object for which the amendment was adopted."

The disabilities resulting from an unconstitutional law cannot be made the legitimate basis of subsequent legislation for reimposing the same, or the accom-

plishment of similar disabilities. That is the principle in the attempt of this Oklahoma amendment to reimpose upon negroes the same, or similar disabilities, in a modified form, for no other reason than the former existence of the disabilities removed by the fifteenth amendment.

The Oklahoma amendment is defended upon the theory that, if laws can be framed so as to abridge the rights of most negroes and a few white men, and to give most whites and a few negroes exemption from such, then such system, in view of its effects, is constitutional.

The Oklahoma amendment necessitates a classification of voters, abridging the rights of the least favored class in comparison with the rights of the privileged class; and refers to and adopts the election laws of the states on and prior to January 1, 1866 as the rules of classification. It adopts no general rule of classification of all voters, because there was no general law prescribing the electoral qualifications in the United States; for which reason the rules of classification change with each state; and, affecting voters who, and whose ancestors, formerly lived in Georgia, it conforms to the previous laws of Georgia; and affecting voters who, and whose ancestors, formerly lived in Massachusetts, it conforms to the previous laws of that state.

A rule which, if general, would discriminate in

part, or at certain points of application, or against certain persons, on account of race and color, would to that extent be unconstitutional.

In Georgia this rule discriminated against negroes because of their race and color, and this fact is not changed by the lack of such discrimination in Massachusetts; these same Georgia laws as well as the Massachusetts laws are adopted as rules of classification, each applying, the Massachusetts law to voters who and whose ancestors formerly resided in that state, making no discrimination on account of race or color; and the Georgia law to voters who and whose ancestors formerly resided in that state, clearly discriminating against negroes, because of their race and color; and being so adopted by the Oklahoma amendment as its rules of classification, the Oklahoma amendment necessitates that negroes who and whose ancestors formerly resided in the discriminating states, be placed in the less favored class of Oklahoma voters, solely on account of race and color, because this is the test which the classification rules apply.

The suggestion that, since the discrimination is not identical with race lines, when the whole United States is used as one illustrative group, the amendment does not discriminate against any one on account of race and color, is not applicable to this amendment at all.

The amendment necessitates as many different illustrative groups of voters in its application as there are different states and countries represented by the voters of Oklahoma.

In its application to voters coming from Massachusetts there would be no discrimination on account of race and color, but the negro then residing in Georgia did not have the benefit of the laws of Massachusetts; and the amendment requires that he be tested according to the laws of Georgia, thereby making him the victim of racial discriminations.

From this it is obvious that the amendment requires that the voters from each separate state are to be treated as a separate group, the rights of the members of which are to be determined by the former election laws of such state.

Upon what reasoning can it be urged that a negro from Georgia is not discriminated against for racial reasons, when the discriminatory laws of Georgia pursue him still in the Oklahoma amendment, merely because a negro from Massachusetts is not so pursued? To him, the Oklahoma amendment reads in the terms of the Georgia law; except that then he was disfranchised absolutely because of race and color, and now for the same reason, he must be able to read and write.

To him the phrase, "entitled to vote under any form of government" means the constitution and laws

of Georgia, which disfranchised him and his ancestors because of race and color.

Wherever this amendment necessitates discrimination between white and colored voters from the same state, it is unconstitutional; and the fact that negroes were not discriminated against in some other states, and therefore may vote in Oklahoma without being able to read and write, has nothing to do with the matter in its application to voters from states where there was such discrimination.

The Oklahoma discrimination is identical with that great body of legislation which discriminated against the negro race because of race, color and previous condition of servitude, which was struck down by the fifteenth amendment, and is now regarded as unconstitutional in every line of American jurisprudence. And it is an American historical and judicial fact, that that body of legislation was directed against the negro as such, and it is this which the Oklahoma amendment attempts to accomplish in Oklahoma, directing against each citizen of the state of Oklahoma that race discrimination which was directed against him and his ancestors in the state of former residence.

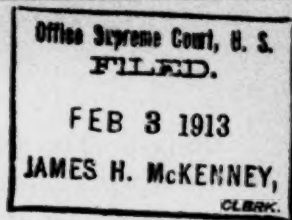
A law ostensibly directed against a condition is directed against the thing or cause with respect to which the condition existed.

Therefore, wherever the laws of former residence, imported into this Oklahoma amendment as a rule of

classification, contains in itself provisions which necessitate a classification according to race and color, the Oklahoma amendment necessitates the same classification for the same cause, and is unconstitutional; because, in such instances, the privilege of the Oklahoma amendment is based upon a right allowed to white men, as such, and denied to negroes, as such.

RESPECTFULLY SUBMITTED,

JOHN H. BURFORD,
JOHN EMBRY.



No. ~~000~~ 428 96

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

FRANK GUINN AND J. J. BEAL, *Plaintiffs in Error.*

v.

THE UNITED STATES, *Defendant in Error.*

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

The Solicitor General, on behalf of the United States, moves that this case be advanced for early hearing because it is a criminal case and is one involving a question of great importance.

This case presents the question of the validity under the Federal Constitution of the so-called "grandfather clause" in the Oklahoma constitution prescribing the qualifications for electors.

The defendants were indicted for conspiring, in violation of section 19 of the Criminal Code, to intimidate, because of their race and color, certain negroes, citizens of the United States, in the free exercise of their right to vote in a congressional

election. The defendants justified under the State law enacted in pursuance of the "grandfather clause" and providing as follows:

- nor shall any person be allowed to vote in any election held herein, unless he is able to read and write any section of the constitution of the State of Oklahoma; but no person who was, on January 1, 1866, or any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person shall be denied the right to vote because of his inability to so read and write section of such constitution. (Session Laws Okla., 1911, p. 232.)

They were convicted and appealed to the Circuit Court of Appeals. That court has certified here two questions:

1. Was the amendment to the constitution of Oklahoma, heretofore set forth, valid?

2. Was that amendment void in so far as it attempted to debar from the right or privilege of voting for a qualified candidate for a Member of Congress in Oklahoma, unless they were able to read and write any section of the constitution of Oklahoma, negro citizens of the United States who were otherwise qualified to vote for a qualified candidate for a Member of Congress in that State, but who were not, and none of whose lineal ancestors was, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, because they were then slaves?

It is obvious that the case presents an important question and since other elections are coming on in which the same trouble may arise, it is desirable that an early hearing and disposition of the case may be had. The defendants are out on bail.

Notice of this motion has been given opposing counsel.

WM. MARSHALL BULLITT,

Solicitor General.

FEBRUARY 3, 1913.



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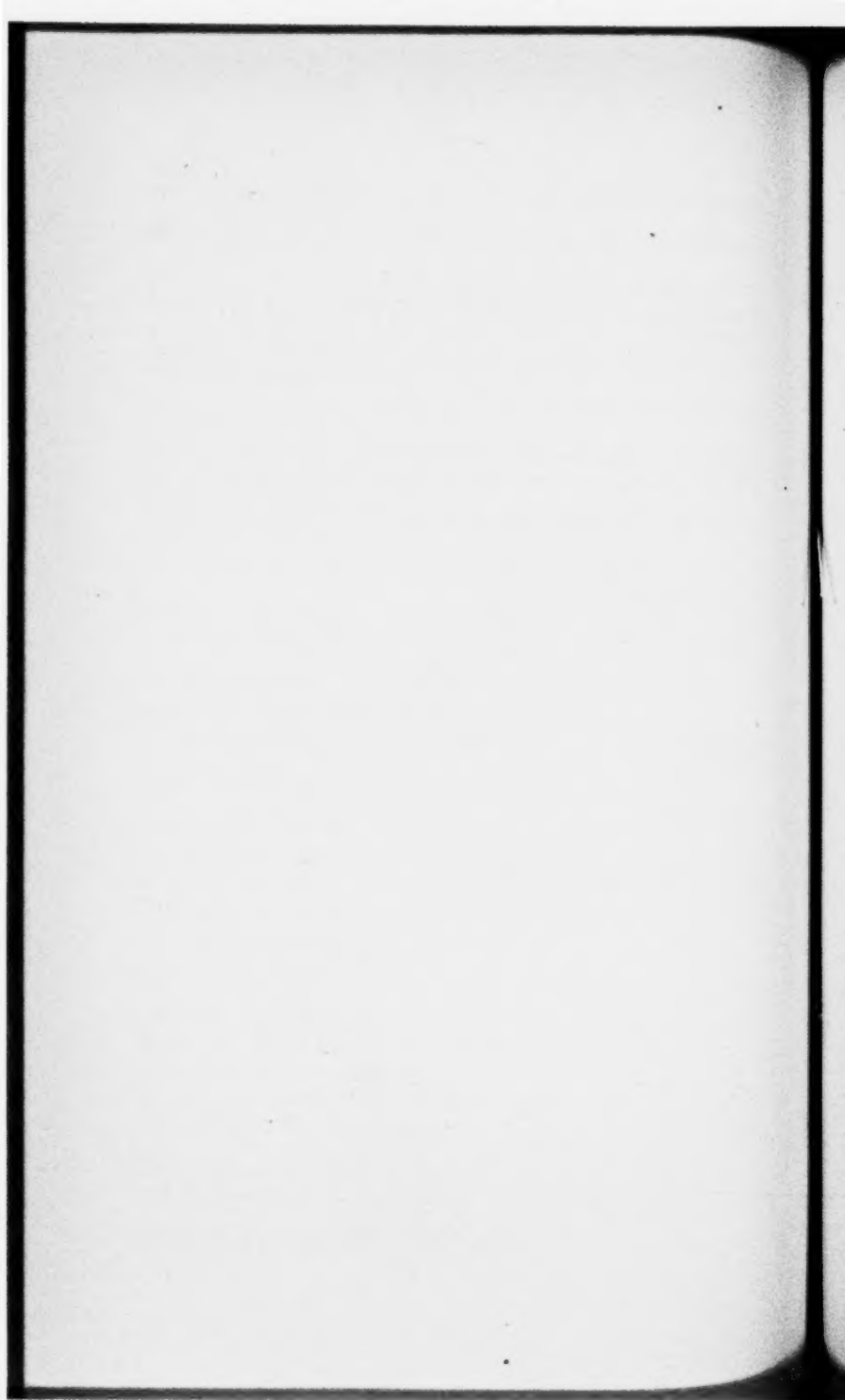
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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

FRANK GUINN AND J. J. BEAL	}	No. 423.
v.		
THE UNITED STATES.		

*ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

It is not necessary to recapitulate the facts, so succinctly stated by the Circuit Court of Appeals in its certificate, but for convenient reference we may repeat in advance of the argument the provisions of the Oklahoma constitution and of the Constitution of the United States which are involved.

The original constitution of the State of Oklahoma provided, with certain exceptions not material to this case, that—

The qualified electors of the State shall be male citizens of the United States, male citizens of the State, and male persons of Indian

descent native of the United States, who are over the age of twenty-one years, who have resided in the State one year, in the county six months, and in the election precinct thirty days, next preceding the election at which any such elector offers to vote. (Const. Oklahoma, art. 3, sec. 1; Cert. 2.)

In 1910, prior to the 8th day of November of that year, the day of the general election, the following amendment to the constitution was adopted:

No person shall be registered as an elector of this State, or be allowed to vote in any election herein, unless he be able to read and write any section of the constitution of the State of Oklahoma. And no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution. Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officer when electors apply for ballots to vote. (Cert. 2.)

We shall insist in argument that this amendment contravenes the Fifteenth Amendment to the Constitution of the United States, which reads as follows:

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

The Circuit Court of Appeals certifies two questions of law:

1. Was the amendment to the constitution of Oklahoma, heretofore set forth, valid?

2. Was that amendment void in so far as it attempted to debar from the right or privilege of voting for a qualified candidate for a Member of Congress in Oklahoma, unless they were able to read and write any section of the constitution of Oklahoma, negro citizens of the United States who were otherwise qualified to vote for a qualified candidate for a Member of Congress in that State, but who were not, and none of whose lineal ancestors was, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, because they were then slaves? (Cert. 4.)

It is clear that the first question has to do with the validity of the amendment as a whole, and that the second question is addressed to the validity of but a single clause. It will be found convenient to consider them in their inverse order.

ARGUMENT.**I.**

The questions propounded by the Circuit Court of Appeals are raised by the facts as certified and are indispensable to a determination of the cause.

But for the fact that this proposition is disputed by plaintiffs in error, it would seem unnecessary to discuss it in this brief. The objection comes with ill grace from that quarter, in view of the fact that the fourteenth assignment of error made by them in the Circuit Court of Appeals is to this effect:

The court erred in instructing the jury as follows: "In the opinion of the court the State amendment, which imposes the test of reading and writing any section in the constitution as a condition to voting to persons not on or prior to January 1, 1866, entitled to vote under some form of government, or as a resident of some foreign nation, or a lineal descendant of some such person, is not valid," and an exception to this portion of the charge of the court was duly made and preserved at the time it was given. (Cert. 4.)

It occasions some surprise to be told by those who assigned this instruction as reversible error on the part of the trial court that the questions of law settled by it are not involved in the record.

This court will not always refuse to answer questions propounded by the Circuit Court of Appeals, even when it doubts whether they are actually raised by the facts contained in the certificate. *New Eng-*

land R. R. Co. v. Conroy, 175 U. S. 323. But in the present instance it is not necessary to invoke the grace of this rule.

Plaintiffs in error were indicted under section 5508 of the Revised Statutes, now section 19 of the Criminal Code, for a conspiracy to injure, oppress, and intimidate, on account of their race and color, certain negro citizens who were qualified voters in the full exercise and enjoyment of their right to vote for a Member of Congress at the general election. (See *Ex parte Yarbrough*, 110 U. S. 651.)

They defended on the ground that no right of these negro citizens had been invaded, and that they were not so entitled to vote, because they did not possess the qualifications requisite for electors of the most numerous branch of the State legislature (Const. U. S., Art. I, sec. 2); that notwithstanding they might have been qualified electors under the original constitution of Oklahoma, they were no longer so since the amendment adopted in 1910. The Government in turn replied that the amendment was unconstitutional and void, and that the electoral status of the negro citizens in question was in no way affected by it. It is difficult to see how the validity of this particular amendment could have been more directly drawn in question.

It is no answer to say, in the language of the brief filed by the plaintiffs in error (pp. 18-19)—

that if the enforcement of the grandfather clause was a necessary ingredient in the

offense charged against the defendants in the court below, the defense interposed would necessarily be, either that the election officers believed the law to be constitutional although it might not be so, or that regardless of its constitutionality they were compelled under the decisions of our own state to enforce the election law under consideration without question as to its constitutionality. If they were compelled to enforce the law regardless of its validity because as officers of their state they could not question such validity, then the constitutionality of the clause under consideration could not have been in question at the trial. And further, if they enforced such law believing it to be constitutional, then the actual constitutionality of the law was still not in question.

We, therefore, conclude that the validity of the grandfather clause is not necessary to the determination of this controversy, and that the injection of its constitutionality into the case by the judge of the court below was unauthorized and unsupported either by the nature of the offense charged under Section 19, or by the facts of the case as shown by the fact of the Court's certificate.

The "enforcement of the Grandfather Clause" was not a "necessary ingredient" in the offense charged against the defendants, which was a conspiracy to deny qualified electors the right to vote. The Grandfather Clause was presented by way of defense to show that the complaining witnesses were not qualified electors.

The suggestion that the plaintiffs in error were compelled to regard and enforce this law without question as to its constitutionality may be answered by the language of this court in *Huntington v. Worthen*, 120 U. S. 97-101, that "an unconstitutional act is not a law; it binds no one, and protects no one." *Ex parte Virginia*, 100 U. S. 339. The right of the negro citizens mentioned in the indictment to be permitted to vote for Members of Congress was derived, like the right of any white voter, from Article I, sections 2 and 4, of the Constitution; and if the Grandfather Clause of 1910 was invalid, they were as fully qualified to vote as though it had never been conceived.

As to the other defense suggested, to wit, the good faith of the election officers, it is enough to say that, in the language of the certificate, there was "substantial evidence that the defendants * * * wilfully and corruptly conspired together to injure, oppress, and intimidate some of these negro citizens named in the indictment as therein charged," that the question was expressly submitted to the jury by the trial court, and that the jury having the facts before them found this particular issue against the defendants.

It would seem, therefore, that the validity of the amendment of 1910 to the Oklahoma constitution is not only raised by the facts certified, but is the pivotal question in the case.

II.

Answer to the second question propounded by the court:—The Grandfather Clause of the amendment to the constitution of Oklahoma of the year 1910 is void because it violates the Fifteenth Amendment to the Constitution of the United States.

Article 3, section 1, of the original constitution of Oklahoma fixes the qualification of voters by their sex, citizenship, age, and residence. In its provisions there is no discrimination to be found on account of race, color, or previous condition of servitude. It excludes by implication from the list of voters females, foreigners or aliens, minors, and non-residents; and in the excluded classes likewise no discrimination is made for any of the prohibited causes.

The amendment of 1910 undertakes an entirely new classification of the voters of the State and divides them into two classes, literate and illiterate. All of the literate voters qualified by sex, citizenship, age, and residence are entitled to the suffrage without discrimination because of race, color, or previous condition of servitude. Illiterate voters, on the other hand, must, in addition to the necessary qualifications of sex, citizenship, age, and residence, belong to one or the other of two classes; first, those who were on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, and their lineal descendants; second, those who at that time, to wit, January 1, 1866, resided in some foreign nation, and their lineal descendants.

All other illiterates are remanded to the class of non-voters. This portion of the amendment has been baptized with the name of the "Grandfather Clause." The reasons for its invalidity may be stated as follows:

(1) The Grandfather Clause incorporates by reference the laws of those States which in terms excluded negroes from the franchise on the 1st day of January, 1866, because of race, color, or condition of servitude, and so itself impliedly excludes them for the same reason.

The doctrine of incorporation by reference—that is, that a statute referred to in a later enactment must be considered in interpreting the later act as though actually embodied therein—has been frequently enunciated and applied.

Bank for Savings v. The Collector, 3 Wall. 495, 513.

In re Heath, 144 U. S. 92.

Ex parte Crow Dog, 109 U. S. 556, 561.

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Donnelly v. United States, 228 U. S. 243.

See also Endlich, *Interpretation of Statutes*, sec. 492; Sutherland, *Statutes*, 2d ed., sec. 405; Potters' *Dwarris on Statutes and Constitutions*, pp. 190-192, 218.

What is implied in a statute is as much a part of it as what is expressed.

United States v. Babbitt, 1 Black, 55, 61.

Gelpcke v. Dubuque, 1 Wall. 175, 220.

Wilson County v. Third National Bank, 103 U. S. 770, 778.

The language of the amendment leaves no escape from this conclusion. It extends the right of suffrage to those illiterates who were *entitled to vote* on or prior to January 1, 1866, and to the lineal descendants of those so entitled. This is something quite different from extending the right to those who had actually voted or been registered as voters prior to that date. Whether a man has actually voted or been registered as a voter is a pure question of fact, to be disclosed by parol evidence, or at most by the production of the poll lists and registration books if still in existence. But whether at a given time he was entitled to vote is a mixed question of law and fact, to be resolved only by consulting the law fixing the qualifications for suffrage and then the facts as to his possession of those qualifications. It is quite true that suffrage is a political and not a natural right, and that it may be granted or withheld by the State at its pleasure. In order, therefore, to ascertain what persons have enjoyed it at any particular time, recourse must necessarily be had to the constitution and laws of the government under which they were then living. The words "entitled to vote" have express reference to the legal status of the individual and not to any acts done by him.

This becomes the more apparent when we consider the manner in which the amendment must be administered. Suppose a citizen unable to read or write presents himself for registration, or at an

election as a voter, the inquiry at once must be where he was living on or prior to the 1st day of January, 1866; or, if born since that date, where his ancestors were living and what the suffrage laws of his or their domicile were at that time. If he proves to have been a white man and a resident of the State of Virginia, for instance, he will be admitted to vote; but if a black man and a resident of the same State at the same time, his vote will be refused, because only whites were then entitled to vote under the laws of that State.

To present the same thought from another angle, let us change somewhat the form, though not the effect, of the clause under consideration. Suppose it read, "No person who was on January 1, 1866, or at any time prior thereto, entitled to vote under the government of the State of Virginia shall be denied the right to register and vote because of his inability to so read and write sections of such constitution." How could the meaning of such a law be ascertained without looking to the constitution and election laws in force in the State of Virginia on the 1st day of January, 1866, and prior thereto? And if by some cataclysm access to these laws should be denied and those familiar with their contents wiped out, in what way could the intent and purpose of this clause be arrived at? And if it should prove, as of course it would, that on the 1st day of January, 1866, in the State of Virginia color was made the test of the right to vote, by what process of metaphysical reasoning

could it be shown that color was not also the test of the later act, which depended for its interpretation solely upon reference to the earlier? The only effect of using in the clause at bar the words "entitled to vote under any form of government" instead of those "entitled to vote in the State of Virginia," is to multiply the constitutions and statutes which are by reference included.

Of course, this Grandfather Clause does not use any adjective of color and does not designate any race or refer in express terms to any previous condition of servitude. If it read that "all illiterate persons who on January 1, 1866, or at any time prior thereto, were not entitled to vote because of their race, color, or previous condition of servitude * * * shall be denied the right to register and vote," no one would dispute its unconstitutionality. In effect, though not in words, it says just that. In law, as in mathematics, things which are equal to the same thing are necessarily equal to each other; and the meaning of a phrase, not the words in which it happens to be couched, must be considered.

But we are assured on behalf of the plaintiffs in error that "if 1871 had been selected as the date it would have had no more or less significance than 1866. It is true that 1871 would have been a date succeeding the time at which the Fifteenth Amendment was adopted, but this would have given the citizen simply a little longer line of ancestors through whose qualifications he might claim the right to vote,

although he himself could not read and write." (Brief, pp. 59-60.) This argument clearly begs the question.

The Fifteenth Amendment was ratified by 28 out of the then 37 States by the 17th of February, 1870, and afterwards by the State of Texas on February 18, 1870; by the State of Minnesota on February 19, 1870, and later still by the State of New Jersey on the 21st of February, 1871. Its ratification was proclaimed by the Secretary of State on the 30th day of March, 1870. Its legal effect has been the subject of repeated adjudications by this court. While it did not confer the right of suffrage upon anyone, it did confer on citizens of the United States from and after the date of its ratification a new and substantial right, to wit, the right not to be discriminated against in the exercise of the elective franchise on account of race, color, or previous condition of servitude.

United States v. Reese, 92 U. S. 214.

United States v. Cruikshank, 92 U. S. 542.

And in all cases where the former slaveholding States had not removed from their constitutions the word "white" as a qualification for voting, the amendment did in effect confer upon the colored man the right to vote, because, being paramount to the State law, it annulled the discriminating word "white" and thus left him in the enjoyment of the same rights as white persons. In such cases the amendment does *proprio vigore* substantially confer on the negro the right to vote.

Neal v. Delaware, 103 U. S. 370.

Ex Parte Yarbrough, 110 U. S. 651.

If, therefore, the date fixed in this amendment had been the year 1871 instead of the year 1866, the constitutions and laws to which it referred, and which were by such reference made a part of it, would have been already purged of the vice of racial discrimination, and the amendment itself would have been likewise free from it. To reflect upon the change which would be wrought in the meaning of this Grandfather Clause by the substitution of the year 1871 for the year 1866 is to be confirmed in the conviction of its utter invalidity.

A gulf of forty years separates the ratification of the Fifteenth Amendment from the adoption of the Grandfather Clause of the Oklahoma constitution, and in these years the rancorous passions which surrounded the earlier event have happily subsided. Had the later event followed closely upon the heels of the earlier, we can little doubt what view would have been taken of it. What would have been said if the State of Virginia, for example, immediately following the proclamation of the Fifteenth Amendment, had issued a call for a constitutional convention and had on the 1st day of June, in the year 1870, adopted a suffrage amendment to its constitution conferring the right to vote upon all of its literate citizens and upon those illiterates only who were entitled to vote on the 1st day of January, 1870? How would it have been possible to ascertain the meaning of such a provision without reading into it the constitution in force in the State of Virginia before the adoption

of the Fifteenth Amendment? Can it be imagined for a moment that this would not at once have been detected as a deliberate effort to evade and defeat the purpose of the Fifteenth Amendment? The constitution of the State of Virginia on the 1st day of January, 1870, contained in its suffrage clause the word "white." On the 17th day of February, or not later than the 30th day of March of that year, the Fifteenth Amendment struck it out. If it could have been restored in a later constitution simply by readopting as qualifications for suffrage those in force on the 1st day of January, 1870, without specifically repeating them, how quickly this would have been done; and how quickly in the then temper of the times this course would have found imitators.

It is argued that a distinction is to be drawn between the reason for disqualification and the fact of disqualification, and that the Grandfather Clause is concerned with the latter only. The obvious answer to this suggestion is that already given, to wit, that the right to vote is a mixed question of law and fact, impossible of ascertainment without reference to those constitutions and statutes by which the right is conferred, and that by such constitutions and statutes in many cases prior to the 1st day of January, 1866, it was made to depend upon race, color, or previous condition of servitude.

Here the court will note a wide difference between this clause and one such as that adopted in the State of Virginia in 1902, which extends the right of regis-

tration to persons, even though illiterate, who prior to the adoption of the Virginia constitution had served in time of war in the Army or Navy of the United States, or of the Confederate States, or of any State of the United States or the Confederate States, or to any son of such person. Service or nonservice in time of war is a question of fact and of fact alone.

(2) The necessary effect and operation of the Grandfather Clause is to exclude practically all illiterate negroes and practically no illiterate white men, and from this its unconstitutional purpose may legitimately be inferred.

(a) A candid reading of the amendment in the light of those facts, of which judicial knowledge may be taken, must convince the court that this is the real purpose, and that the object intended is accomplished.

If the amendment had ended with the first sentence, thereby denying the right to vote to any persons unable to read and write any sections of the State constitution, there would be no question as to its validity. That provision, standing alone, would apply to all races and colors alike. But, as we have attempted to show, so much can not be said of the second sentence relating to illiterates.

The Supreme Court of the State of Oklahoma, in holding the amendment valid, declared that the classification was reasonable because "any person who was entitled to vote under a form of government on or prior to said date is still presumed to be qualified to exercise such right, and the presumption fol-

lows as to his offspring; that is, that the virtue and intelligence of the ancestors will be imputed to his descendants, just as the iniquity of the fathers may be visited upon the children unto the third and fourth generation." *Atwater v. Hassett*, 27 Okla. 292, 315. But a white man may have been on that date the meanest and commonest kind of a thief or robber, and under sentence as such, and yet as to his descendants all of the iniquities were wiped out if at any time prior to his conviction he was a qualified voter. And, on the other hand, one may have been on that date an orphan, and under 21 years of age, so that he was not then and had not been entitled to vote, and may have had on that date no ancestor known to him who was a qualified voter; the sin of his being so incapacitated is visited upon his posterity through succeeding generations. Of course, such cases must be exceedingly few; but the illustration, though extreme, shows that the amendment was not adopted in order to reward inherited virtues.

According to the Thirteenth Census of the United States, the white population of Oklahoma in 1910 was 1,444,531. Of this number, 40,084 were foreign born, and 49,877 were native born, but of foreign parentage. Thus it appears that of the total white population of Oklahoma of nearly a million and a half, only 89,961 were of foreign birth or parentage. (Abstract of 13th Census, ch. 2, p. 83.) And only a negligible number of the latter could by any possibility be disqualified under the Grandfather Clause,

for all those who came from a foreign country where they had ever been entitled to vote, or who had resided on January 1, 1866, in some foreign nation, and all of the lineal descendants of either, were within the express exception of that clause. It is too apparent for serious discussion that the number of white men who would be subjected to the educational test under this classification would be insignificant.

The necessary operation of the law upon the negro population, on the other hand, is equally clear.

Since an African tribe is not a "foreign nation" in the accepted sense (1 Moore, *Internat. Law Dig.* 16; Wheaton, *Elements Internat. Law*, 6th ed., 28), no negro or his descendant who migrated from his original habitat to this country since January 1, 1866 (if such there be in Oklahoma), would qualify under this clause.

The negro born in a "foreign nation" proper may also be disregarded for lack of numbers. Of 40,442 foreign born in Oklahoma in 1910, 40,084 were white, leaving 358 foreign born to be distributed among the negroes (numbering 137,612), Indians (numbering 74,825), Chinese (numbering 139), and Japanese (numbering 48), who inhabited Oklahoma in the year 1910. Since throughout the United States 93.8 per cent of the Japanese and 79.1 per cent of the Chinese are foreign born, while 1 per cent of the Indians and only four-tenths of 1 per cent negroes are foreign born, it is readily seen that

even this diminutive total must be credited largely to the Chinese and Japanese members of the population.

We have really to deal then only with the native-born negroes and their former States of residence.

On January 1, 1866, and prior thereto, the negro was disqualified from voting by the organic acts and statutes of all the Territories and the constitutions of all the States except Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, New York, New Jersey, and Michigan. In these States he was entitled to vote on that date.¹ By the census of

¹ This statement may be verified by a reference to the following citations:

State.	Constitution of—	Article.	Section.	Thorpe's American Constitutions, p.—
Alabama.....	1805.....	8	1	131
Arizona.....	Act of Cong., Feb. 24, 1863.....		2	239
Arkansas.....	1864.....	4	2	291
California.....	1849.....	2	1	393
Colorado.....	Act of Cong., Feb. 28, 1861.....		5	466
Connecticut.....	Amendt., 1845.....	8		549
Delaware.....	1831.....	4	1	589
Florida.....	1865.....	6	1	695
Georgia.....	do.....	5	1	830
Idaho.....	Act of Cong., Mar. 3, 1863.....		5	907
Illinois.....	1818.....	6	1	1002
Indiana.....	1851.....	2	2, 5	1094
Indian Territory.....	Act of Cong., June 30, 1834.....			1097
Iowa.....	1857.....	2	1	1139
Kansas.....	1839.....	5	1	1251
Kentucky.....	1850.....	2	8	1294
Louisiana.....	1864.....	Title 3	Art. 14	1433
Maine.....	1819.....	2	1	1649
Maryland.....	1864.....	1	1	1746
Massachusetts.....	1780, amends.....	3		1912
		20		1919
		28		1921
Michigan.....	1850.....	7	1	1956, 1978
Minnesota.....	1857.....	7	1	2007
	(Cl. Minn. Pub. Stats. (1849-1858), LV, and 1 St. L. (1875), 56.)			
Mississippi.....	1832.....	3	1	2051
Missouri.....	1865.....	2	18	2198
Montana.....	Act of Cong., May 26, 1864..... (Laws Mont. (1864), id. 375.)		5	2284
Nebraska.....	Act of Cong., May 30, 1854.....		5	1163
	Act of Cong., Apr. 19, 1864.....		3	2344

1860 the total number of negroes in continental United States was 4,441,830; of this number those resident in all the eight States mentioned totaled only 97,229, or 14,000 less than those in the single State of Arkansas, which had the smallest number in any Southern State.

Bulletin No. 8 of the Census Bureau, issued in 1904, entitled "Negroes in America," contains a chart showing the nativity of the negroes in the various States. This information is based upon the census of 1900. Like information based upon the census of 1910 is not yet available.

In 1900 there were 55,684 negroes in the Territory of Oklahoma and the Indian Territory. Of this

State.	Constitution of—	Article.	Section.	Thorpe's American Constitutions, p.—
Nevada.....	1864.....	2	1	2404
	1880, amendt.....	18	1	2429
New Hampshire.....	1792.....	Part 2	13	2477
			28	2479
			42	2481
New Jersey.....	1844.....	2	1	2601
New Mexico.....	Act of Cong., Sept. 9, 1850.....		6	2618
New York.....	1846.....	2	1	2656
North Carolina.....	1776.....	7		2790
	1835, amendt.....	1	3	2796
	1856, amendt.....	1	3	2799
North Dakota.....	Act of Cong., Mar. 2, 1861.....		5	2847-2848
Ohio.....	1851.....	5	1	2924
Oklahoma. (See New Mexico, <i>supra</i> .)				
Oregon.....	1857.....	2	2	3000
			6	3001
Pennsylvania.....	1838.....	3	1	3108
Rhode Island.....	1842.....	7	1	3236
South Carolina.....	1865.....	4		3276
South Dakota. (See Nebraska, <i>supra</i> .)				
Tennessee.....	1834.....	4	1	3433
	(Tenn. Code, 1856; <i>Cy.</i> secs. 3808, 3809.)			3434
Texas.....	1845.....	3	1	3549
	1866.....	3	1	3572
Utah.....	Act of Cong., Sept. 9, 1850.....		5	3586
Vermont.....	1793.....	Ch. 2	8, 10	3765
Virginia.....	1864.....	3	1	3854
Washington.....	Act of Cong., Mar. 2, 1853.....		5	3965
West Virginia.....	1861-1863.....	3	1	4016
Wisconsin.....	1848.....	3	1	4080
Wyoming. (See Montana, <i>supra</i> .)				

number, 23,003 were born in the two Territories. Of the remaining 32,681, the number who were born in the above-mentioned eight States, wherein the negroes were permitted to vote in 1866, were distributed among those States as follows:

Maine.....	None.
New Hampshire.....	None.
Vermont.....	None.
Massachusetts.....	6
Rhode Island.....	3
New York.....	20
New Jersey.....	8
Michigan.....	20
Total.....	57

The rest, 32,624 in number, were born in the States and Territories where negroes were not permitted to vote in 1866.

According to the census of 1910, there were 137,612 negroes in the State of Oklahoma in that year, and there is no reason to doubt that the ratio thus shown between those born in the States in which they were disfranchised on January 1, 1866, and those born in the States wherein they could vote on that date, was then maintained.

The statistics with reference to illiteracy are equally interesting. According to the census of 1910, the number of white illiterates in the State of Oklahoma, 10 years old and upward, was 32,605, or 3.5 per cent of the white population of that age; while the number of negro illiterates was 17,858, or 17.7 per cent of the negro population of like age. (Abstract 13th Census, p. 245.) The total number of illiterate males, over 21 years of age, of all races

was 28,707, or 6.4 per cent, and these in turn were divided as follows:

		Per cent.
Native white of native parentage.....	14,345	4.2
Native white of foreign or mixed parentage.....	479	1.7
Foreign-born white.....	2,188	9.3
Negro.....	7,396	20.1
Unclassified.....	4,299	

(Idem, p. 256.)

The proportion of negroes qualified under the test imposed by the Grandfather Clause, therefore, is as inconsiderable as the proportion of whites thereby disqualified. It is doubtless true that if the law were fairly administered, a few negroes would escape the required educational test, and a few white men would be subjected thereto. But it is hard to conceive of a requirement which could make the line of demarcation between eligibles and ineligibles coincide more closely with the color line without using the prescribed word "white" or other terms of discrimination on account of race, color, or previous condition of servitude, than does the one which was adopted.

Indeed, this lengthy analysis is hardly necessary to show the end in view. That is apparent upon the most casual inspection. If the disfranchisement of the illiterate negro were not its purpose, the clause may be declared well nigh devoid of meaning. Nothing more irrational or arbitrary than the tests imposed could be devised if there were no colored race in Oklahoma. The presence of that race and the existence of the racial question at least lends color of reason to the distinctions adopted. This is further emphasized by a comparison of the census

figures for the years 1900 to 1910. In 1900 the negro population of Oklahoma and the Indian Territory was 55,684. In 1910 this number had increased to 137,612, an increase of 147.1 per cent as compared with an increase of 115.5 per cent for the whites. Oklahoma showed the highest relative increase of negroes of any State in the Union.

In practical operation, therefore, the amendment inevitably discriminates between the class of illiterate whites and illiterate blacks as a class, to the overwhelming and well-nigh universal disadvantage of the latter. By the light of this illuminating fact the purpose and intent of the law become plainly visible—a purpose and intent that stand condemned at the bar of the Federal Constitution. But in emphasizing this position we must not for a moment lend color to the thought that the vice of the law consists solely in the multitude of those adversely affected by it. The protection of the Constitution was extended to an entire race—to all races—it is true, but it is extended just as much to the humblest member of that race. Each single individual in it, if a citizen of the United States, is assured that neither the United States nor any State shall deny or abridge his right to vote on account of race, color, or previous condition of servitude; and any law to the contrary, no matter from how high a source it comes, or how adroitly its purpose may be hidden, is invalid and void though he alone be reached by it. To sustain the validity of a suffrage amendment such as the present, it must

appear not that under certain conditions some of every race may be admitted to the suffrage, but that under no condition will any member of any race be excluded *for racial reasons*. In each and every line and syllable, in meaning as well as in phrase, in fulfillment as well as in promise, the races must stand side by side.

(b) The necessary effect and operation of a State statute or constitutional amendment may be considered in determining its validity under the Federal Constitution.

It is insisted by plaintiffs in error that the amendment is to be judged solely and only by what appears on its face, and that inasmuch as it contains no words descriptive of race, color, or previous condition of servitude, all inquiry into its operation and effect is beside the mark. Of this proposition it can be said that it not only violates the rules of reason, but has been repeatedly urged upon this court and as repeatedly disapproved. It conflicts with the fundamental axiom that what can not be accomplished directly can not be accomplished indirectly. As this court said in *Home Insurance Co. v. New York*, 134 U. S. 594, 598:

* * * That which can not be accomplished directly can not be accomplished indirectly. Through all such attempts the court will look to the end sought to be reached, and if that would trench upon a power of the government, the law creating it will be set aside or its enforcement restrained.

Thus in *Yick Wo v. Hopkins*, 118 U. S. 356, an ordinance of the city of San Francisco, which authorized the board of supervisors to grant or refuse permits to conduct a laundry business in frame buildings, was held to be a denial to certain persons of the equal protection of the laws, since by its "necessary tendency" the supervisors were given power to make arbitrary, unjust, and oppressive discriminations, which power they had actually exercised in manifest hostility to certain Chinese subjects.

It will be observed that in this case the court considered both the necessary tendency of the law and its actual operation, saying at pages 373-374:

* * * Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

To like effect is *Ho Ah Kow v. Nunan* (Circuit Court, Cal.), 5 Sawyer, 552, wherein the so-called "queue ordinance" of San Francisco, requiring the clipping of the hair of prisoners in the county jail, was held to deprive Chinese of the equal protection of the laws in violation of the Fourteenth Amendment. It was there said that the court may take cognizance of the fact that the ordinance, although general in its terms, was designed to be enforced

against a particular race, sect, or class. (See p. 560.)

A quite recent utterance of this court on the subject may be found in *Bailey v. Alabama*, 219 U. S. 219. The statute under consideration imposed a penalty upon a fraudulent breach of a contract for service and made the mere failure of performance *prima facie* evidence of the fraud. This, it was insisted, amounted to peonage, and was in violation of the Thirteenth Amendment to the Constitution. In delivering the opinion of the court, Mr. Justice Hughes said:

We can not escape the conclusion that, although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt, and judging its purpose by its effect that it seeks in this way to provide the means of compulsion through which performance of such service may be secured. The question is whether such a statute is constitutional (p. 238).

What the State may not do directly it may not do indirectly. If it can not punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same result by creating a statutory presumption which upon proof of no other fact exposes him to conviction and punishment. Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question (*Henderson v. Mayor*, 92 U. S.,

p. 268), and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid; an instrument of compulsion peculiarly effective as against the poor and the ignorant, its most likely victims. There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based. The provisions designed to secure it would soon become a barren form if it were possible to establish a statutory presumption of this sort and to hold over the heads of laborers the threat of punishment for crime, under the name of fraud but merely upon evidence of failure to work out their debts (pp. 244-245).

To the same effect see—

Henderson v. Mayor of New York, 92 U. S. 259, 268.

Chy Lung v. Freeman, 92 U. S. 275, 278-281.

Missouri v. Lewis, 101 U. S. 22, 32.

Brimmer v. Rebman, 138 U. S. 78, 82.

Minnesota v. Barber, 136 U. S. 313, 319-320, 322-323.

Maxwell v. Dow, 176 U. S. 581, 602.

McCray v. United States, 195 U. S. 27, 60.

Dobbins v. Los Angeles, 195 U. S. 223, 240.

Lochner v. New York, 198 U. S. 45, 64.

Quong Wing v. Kirkendall, 223 U. S. 59, 63-64.

The case of *Williams v. Mississippi*, 170 U. S. 213, relied upon by plaintiffs in error, does not limit or qualify this principle. The court there had under consideration a provision of the constitution of the

State of Mississippi and the statutes enacted pursuant to the same, which made nonconviction of certain crimes, payment of taxes, and ability to read any section of the State constitution, or to understand the same when read or to give a reasonable interpretation thereof, the qualifications of all voters, and which restricted the selection of jurors to qualified electors. It needs no comment to demonstrate how widely these provisions differ from those resorted to in Oklahoma. The court held that these Mississippi enactments did not violate the right of a colored prisoner to the equal protection of the laws.

"The operation of the constitution and laws," said the court, "is not limited by their language *or effects* to one race" (p. 222). (*Italics ours.*)

And again, after quoting from *Yick Wo v. Hopkins*, *supra*, the court said:

This comment is not applicable to the constitution of Mississippi and its statutes. They do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them (p. 225).

Nor do *Barbier v. Connolly*, 113 U. S. 27, or *Soon Hing v. Crowley*, 113 U. S. 703, militate against the operation of the rule. In those cases a San Francisco ordinance, which prohibited washing and ironing in laundries within defined territorial limits between 10 p. m. and 6 a. m., was held to be a proper

exercise of the police power. It was urged in the *Crowley* case that the ordinance was adopted owing to a feeling of hatred against the Chinese and for the purpose of compelling those engaged in the laundry business to abandon their vocation. The court dealt with this contention as follows:

* * * There is nothing, however, in the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. And the rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or *inferrible from their operation*, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile. And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate

only against the class mentioned; and of this there is no pretence (pp. 710-711).

This distinction may well be applied here. We are not inquiring into the motives of the legislators or the people of Oklahoma "considered as the moral inducements for their votes." All that concerns us is those motives "considered as the purposes they had in view," which "will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments." The necessary effect, and indeed the only comprehensible purpose, of the Grandfather Clause in the Oklahoma constitution was to disfranchise as many of the colored race and as few of the white race as possible. This purpose and this effect are directly in conflict with the Fifteenth Amendment to the Federal Constitution.

To quote the Circuit Court for the District of Maryland in *Anderson v. Myers*, 182 Fed. 223 (where a similar enactment was held to violate the Fifteenth Amendment):

It is true that the words "race" and "color" are not used in the statute of Maryland; but the meaning of the law is as plain as if the very words had been made use of; and it is the meaning, intention, and effect of the law, and not its phraseology, which is important (p. 228).

III.

Answer to the first question propounded by the court:—The Grandfather Clause being in violation of the Fifteenth Amendment and void, the amendment of 1910 to the constitution of Oklahoma as a whole is likewise invalid. The unconstitutional portion of the amendment is not separable from the remainder.

The general rule that where part of a statute is unconstitutional and void, the valid parts will be enforced where they are distinctly separable, is too well settled for discussion or dispute.

Equally well settled is the converse of this proposition: If the elimination of the invalid section would impair the purpose of the act as a whole and produce results not contemplated by the legislature, the entire statute must fall.

As was said in *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 395:

* * * It is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may thus be dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the legislature would not have enacted that which is within, independently of that beyond its power.

How can this amendment stand that test? Eliminating the objectionable Grandfather Clause we have left the first clause of the amendment to the effect

that "no person shall be registered as an elector of this State, or be allowed to vote at any election herein, unless he be able to read and write any section of the constitution of the State of Oklahoma." We have conceded that this section, if standing alone, would be valid. The State of Oklahoma has the right to impose an unqualified and unconditional literacy test upon its electors.

Perhaps it is possible to save a portion of the second section reading in effect as follows:

And no person who on January 1, 1866, resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution.

We say "perhaps," because, tested by its effect in the light of the facts hereinbefore stated, this clause also might well be held discriminatory along racial lines.

But even so, can it be said for a moment that this represents the electoral plan which the legislature of the State of Oklahoma submitted to its people and which the people of the State ratified? Did those outside the legislature as well as within it, who voted for and against the adoption of this constitutional amendment, vote for and against the adoption of an unqualified, unconditional, literacy test for suffrage; or did they vote for or against the adoption of a literacy test qualified only by the fact of foreign residence on January 1, 1866? By what

right can it be said that they would have adopted the suffrage scheme in either form? What possible reason could have been assigned by the advocates of the plan for coupling together in the form last suggested the date of January 1, 1866, and residence or nonresidence in a foreign nation at that time? No doubt many of the citizens of Oklahoma who voted for this amendment were illiterate white men who were entitled to vote prior to January 1, 1866, or whose ancestors were so entitled. If the effect of the amendment without the Grandfather Clause would be to disfranchise such a voter, is it conceivable that he voted with this in contemplation? If the literacy test be left standing without qualification, the surprise of such a voter when he wakes up and finds himself alongside his colored brethren outside the land of promise may be better imagined than described.

An exact analogy may be found in the Antitrust Act of the State of Illinois, which was under consideration in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540. By the ninth clause of that act agricultural products or live stock while in the hands of the producer or raiser were exempted from its operation. This exemption having been declared a violation of the Fourteenth Amendment, it was then insisted that the residue of the law might stand, although the exemption was stricken out. The court said (pp. 564-565):

We therefore hold that the act of 1893 is repugnant to the Constitution of the United

States, unless its ninth section can be eliminated, leaving the rest of the act in operation.

The principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative. The first section of the act here in question embraces by its terms *all* persons, firms, corporations or associations of persons who combine their capital, skill or acts for any of the purposes specified, while the ninth section declares that the statute shall not apply to agriculturalists or live stock dealers in respect of their products or stock in hand. If the latter section be eliminated as unconstitutional, then the act, if it stands, will apply to agriculturalists and live stock dealers. Those classes would in that way be reached and fined, when, evidently, the legislature intended that they should not be regarded as offending against the law even if they did combine their capital, skill or acts in respect of their products or stock in hand. Looking then at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live stock dealers were excluded from its operation and thereby protected from prosecution. The re-

sult is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the ninth section.

It is impossible to escape the conclusion that the State of Oklahoma would not have entered upon the policy indicated by this amendment unless the literacy test had been qualified in the manner provided.

CONCLUSION.

We therefore conclude that the first question certified by the Circuit Court of Appeals should be answered in the negative and the second question in the affirmative.

JOHN W. DAVIS,
Solicitor General.

SEPTEMBER, 1913.



GUINN AND BEAL *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR
THE EIGHTH CIRCUIT.

No. 96. Argued October 17, 1913.—Decided June 21, 1915.

The so-called Grandfather Clause of the amendment to the constitution of Oklahoma of 1910 is void because it violates the Fifteenth Amendment to the Constitution of the United States.

The Grandfather Clause being unconstitutional and not being separable from the remainder of the amendment to the constitution of Oklahoma of 1910, that amendment as a whole is invalid.

The Fifteenth Amendment does not, in a general sense, take from the States the power over suffrage possessed by the States from the beginning, but it does restrict the power of the United States or the States to abridge or deny the right of a citizen of the United States to vote on account of race, color or previous condition of servitude.

While the Fifteenth Amendment gives no right of suffrage, as its command is self-executing, rights of suffrage may be enjoyed by reason of the striking out of discriminations against the exercise of the right.

A provision in a state constitution recurring to conditions existing before the adoption of the Fifteenth Amendment and the continuance of which conditions that amendment prohibited, and making those

conditions the test of the right to the suffrage is in conflict with, and void under, the Fifteenth Amendment.

The establishment of a literacy test for exercising the suffrage is an exercise by the State of a lawful power vested in it not subject to the supervision of the Federal courts.

Whether a provision in a suffrage statute may be valid under the Federal Constitution, if it is so connected with other provisions that are invalid, as to make the whole statute unconstitutional, is a question of state law, but in the absence of any decision by the state court, this court may, in a case coming from the Federal courts, determine it for itself.

The suffrage and literacy tests in the amendment of 1910 to the constitution of Oklahoma are so connected with each other that the unconstitutionality of the former renders the whole amendment invalid.

THE facts, which involve the constitutionality under the Fifteenth Amendment of the Constitution of the United States of the suffrage amendment to the constitution of Oklahoma, known as the Grandfather Clause, and the responsibility of election officers under § 5508, Rev. Stat., and § 19 of the Penal Code for preventing people from voting who have the right to vote, are stated in the opinion.

Mr. Joseph W. Bailey, with whom *Mr. C. B. Stuart*, *Mr. A. C. Cruce*, *Mr. W. A. Ledbetter*, *Mr. Norman Haskell* and *Mr. C. G. Hornor* were on the brief, for plaintiffs in error:

Determination of the constitutionality of the Grandfather Clause in the Oklahoma constitution, not being necessary to a full solution of this case, this court will not pass upon the constitutionality of such provision. *Athwater v. Hassett*, 111 Pac. Rep. 802; *Bishop on Stat. Crime*, §§ 805-806; *Braxton County v. West Virginia*, 208 U. S. 192; *Burns v. State*, 12 Wisconsin, 519; *Devard v. Hoffman*, 18 Maryland, 479; *Liverpool Co. v. Immigration Commissioners*, 113 U. S. 39; *Mo., Kans. & Tex. Ry. v. Ferris*, 179 U. S. 606; §§ 19, 20, Penal Code; § 5508,

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Rev. Stats. (§ 19, Penal Code); *Smith v. Indiana*, 191 U. S. 139; *Cruce v. Cease*, 114 Pac. Rep. 251; *New Orleans Canal Co. v. Heard*, 47 La. Ann. 1679.

As to the nature of suffrage, see Jameson on Const. Conventions, § 336.

Suffrage in the States of the American Union is not controlled or affected by the Fourteenth Amendment to the Constitution of the United States. Blaine's Twenty Years in Congress; Brannon's Fourteenth Amendment, 77; *Coffield v. Coryell*, 4 Wash. C. C. 371; Miller's Lectures on Const., 661; *Minor v. Happersett*, 21 Wall. 162; *Slaughter House Cases*, 16 Wall. 36; *Strauder v. West Virginia*, 100 U. S. 303; 1 Willoughby's Constitution, 534; 2 *Id.* 483; 5 Woodrow Wilson's Hist. Am. People.

The Grandfather Clause does not violate the Fifteenth Amendment to the Constitution of the United States. *Ahtwater v. Hassett*, 111 Pac. Rep. 802; *Dred Scott Case*, 19 How. 393; *Dodge v. Woolsey*, 18 How. 371; *Fairbanks v. United States*, 181 U. S. 286; *Fletcher v. Peck*, 6 Cranch, 87; *Mills v. Green*, 67 Fed. Rep. 818; *Mills v. Green*, 69 Fed. Rep. 852; *Mitchell v. Lippencott*, 2 Woods, 372; *McClure v. Owen*, 26 Iowa, 253; *McCreary v. United States*, 195 U. S. 27; *Pope v. Williams*, 193 U. S. 621; *Southern R. R. v. Orton*, 6 Sawyer, 32 Fed. Rep. 478; *State v. Grand Trunk R. R.*, 3 Fed. Rep. 889; Stimson's Fed. & State Const. 224; *United States v. Reece*, 92 U. S. 214; *United States v. Cruickshank*, 92 U. S. 542; *United States v. Anthony*, 11 Blatchf. 205; *United States v. Des Moines*, 142 U. S. 545, *Webster v. Cooper*, 14 How. 488; *Williams v. Mississippi*, 170 U. S. 214; *Yick Wo v. Hopkins*, 118 U. S. 356.

Even though the exemption privilege provided in the Grandfather Law may be invalid, yet, the body of the law may be permitted to stand. *Albany v. Stanley*, 105 U. S. 305; *Trade Mark Cases*, 100 U. S. 82; *Little Rock &c. Ry. v. Worthen*, 120 U. S. 97.

The exception does not deny or abridge the right to vote on account of race, color, or previous condition of servitude.

The purpose and motive which moved the legislature to submit and the people to adopt the amendment are not subject to judicial inquiry.

The exception which is challenged as vitiating the entire amendment, even if open to judicial inquiry, is valid, because it applies without distinction of race, color, or previous condition of servitude.

In support of these contentions, see *Bailey v. Alabama*, 219 U. S. 219; *Cruce v. Cease*, 28 Oklahoma, 271; *Home Ins. Co. v. New York*, 134 U. S. 594; *McCray v. United States*, 195 U. S. 27; *Ratcliffe v. Beal*, 20 So. Rep. 865; *Smith v. Indiana*, 191 U. S. 138; *Soon Hing v. Crowley*, 113 U. S. 703; *United States v. Reese*, 92 U. S. 214; *Williams v. Mississippi*, 170 U. S. 213; *Yick Wo v. Hopkins*, 118 U. S. 356.

Mr. Solicitor General Davis for the United States:

The questions propounded by the Circuit Court of Appeals are raised by the facts as certified and are indispensable to a determination of the cause.

The answer to the second question propounded by the court, is that the Grandfather Clause of the amendment to the constitution of Oklahoma of the year 1910 is void because it violates the Fifteenth Amendment.

The so-called Grandfather Clause incorporates by reference the laws of those States which in terms excluded negroes from the franchise on January 1, 1866, because of race, color, or condition of servitude, and so itself impliedly excludes them for the same reason.

The doctrine of incorporation by reference has been frequently enunciated and applied. *Bank for Savings v. Collector*, 3 Wall. 495; *Donnelly v. United States*, 228 U. S. 243; *Ex parte Crow Dog*, 109 U. S. 556; *In re Heath*,

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144 U. S. 92; *In re Hohorst*, 150 U. S. 653; *United States v. Le Bris*, 121 U. S. 278; *Viterbo v. Friedlander*, 120 U. S. 707. See also: Endlich, *Interp. Stats.*, § 492; Potter's *Dwarris*, pp. 190-192, 218; Sutherland, *Statutes*, 2d ed., § 405.

What is implied in a statute is as much a part of it as what is expressed. *Gelpcke v. Dubuque*, 1 Wall. 175, 220; *United States v. Babbitt*, 1 Black, 55, 61; *Wilson County v. Third Nat. Bank*, 103 U. S. 770, 778.

Whether at a given time a man was entitled to vote is a mixed question of law and fact, to be resolved only by consulting the law fixing the qualifications for suffrage and then the facts as to his possession of those qualifications.

While the Fifteenth Amendment did not confer the right of suffrage upon anyone, it did confer upon citizens of the United States from and after the date of its ratification the right not to be discriminated against in the exercise of the elective franchise on account of race, color, or previous condition of servitude. *United States v. Reese*, 92 U. S. 214; *United States v. Cruikshank*, 92 U. S. 542.

In all cases where the former slave-holding States had not removed from their constitutions the word "white" as a qualification for voting, the Fifteenth Amendment did in effect confer upon the negro the right to vote, because, being paramount to the state law, it annulled the discriminating word "white" and thus left him in the enjoyment of the same right as white persons. *Ex parte Yarbrough*, 110 U. S. 651; *Neal v. Delaware*, 103 U. S. 370.

If, therefore, the date fixed in the Grandfather Clause had been the year 1871—after the adoption of the Fifteenth Amendment—instead of the year 1866, the constitutions and laws to which it referred, and which were by such reference made a part of it, would have been already purged of the vice of racial discrimination, and

the amendment itself would have been likewise free from it. To reflect upon the change which would be wrought in the meaning of this Grandfather Clause by the substitution of the year 1871 for the year 1866 is to be confirmed in the conviction of its utter invalidity.

The necessary effect and operation of the Grandfather Clause is to exclude practically all illiterate negroes and practically no illiterate white men, and from this its unconstitutional purpose may legitimately be inferred.

The census statistics show that the proportion of negroes qualified under the test imposed by the Grandfather Clause is as inconsiderable as the proportion of whites thereby disqualified.

In practical operation the amendment inevitably discriminates between the class of illiterate whites and illiterate blacks as a class, to the overwhelming disadvantage of the latter.

The necessary effect and operation of a state statute or constitutional amendment may be considered in determining its validity under the Federal Constitution. *Bailey v. Alabama*, 219 U. S. 219; *Ho Ah Kow v. Nunan*, 5 Sawyer, 552; *Home Insurance Co. v. New York*, 134 U. S. 594, 598; *Yick Wo v. Hopkins*, 118 U. S. 356. See also: *Brimmer v. Rebman*, 138 U. S. 78, 82; *Chy Lung v. Freeman*, 92 U. S. 275, 278; *Dobbins v. Los Angeles*, 195 U. S. 223, 240; *Henderson v. Mayor of N. Y.*, 92 U. S. 259, 268; *Lochner v. New York*, 198 U. S. 45, 64; *McCray v. United States*, 195 U. S. 27, 60. See also: *Maxwell v. Dow*, 176 U. S. 581; *Minnesota v. Barber*, 136 U. S. 313, 319; *Missouri v. Lewis*, 101 U. S. 22, 32; *Quong Wing v. Kirkendall*, 223 U. S. 59, 63. Distinguishing—*Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; and *Williams v. Mississippi*, 170 U. S. 213.

The answer to the first question propounded by the court is that the Grandfather Clause being in violation of the Fifteenth Amendment and void, the amendment of 1910

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to the constitution of Oklahoma as a whole is likewise invalid. The unconstitutional portion of the amendment is not separable from the remainder. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 564-565; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 395.

The first question certified by the Circuit Court of Appeals should be answered in the negative; the second question in the affirmative.

Mr. Moorfield Storey for the National Association for the Advancement of Colored People:

All discriminations respecting the right to vote on account of color are unconstitutional.

Whether the Oklahoma amendment constitutes such a discrimination is to be determined by its purpose and effect, and not by its phraseology alone.

The undoubted purpose and effect of the amendment is to discriminate against colored voters. *Anderson v. Myers*, 182 Fed. Rep. 223; *Bailey v. Alabama*, 219 U. S. 219; *Brimmer v. Rebman*, 138 U. S. 78; *Collins v. New Hampshire*, 171 U. S. 30; *Chy Lung v. Freeman*, 92 U. S. 275; *Galveston &c. Ry. v. Texas*, 210 U. S. 217; *Giles v. Harris*, 189 U. S. 475; *Giles v. Teasley*, 193 U. S. 146; *Graver v. Faurot*, 162 U. S. 435; *Hannibal & St. Jo. R. R. v. Husen*, 95 U. S. 465; *Henderson v. Mayor of New York*, 92 U. S. 259; *Lochner v. New York*, 198 U. S. 45; *Maynard v. Hecht*, 151 U. S. 324; *Minnesota v. Barber*, 136 U. S. 313; *Mobile v. Watson*, 116 U. S. 289; *New Hampshire v. Louisiana*, 108 U. S. 76; *People v. Albertson*, 55 N. Y. 50; *People v. Compagnie Générale*, 107 U. S. 59; *Postal Tel.-Cable v. Taylor*, 192 U. S. 64; *Schollenberger v. Pennsylvania*, 171 U. S. 1; *Scott v. Donald*, 165 U. S. 58; *Smith v. St. Louis & So. W. Ry.*, 181 U. S. 248; *State v. Jones*, 66 Ohio St. 453; *Strauder v. West Virginia*, 100 U. S. 303; *Voight v. Wright*, 141 U. S. 62; *Williams v. Mississippi*, 170 U. S. 213; *Ex parte Yarbrough*, 110 U. S. 651.

Mr. J. H. Adriaans filed a brief as *amicus curiæ*.

Mr. John H. Burford and *Mr. John Embry* filed a brief as *amici curiæ*.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This case is before us on a certificate drawn by the court below as the basis of two questions which are submitted for our solution in order to enable the court correctly to decide issues in a case which it has under consideration. Those issues arose from an indictment and conviction of certain election officers of the State of Oklahoma (the plaintiffs in error) of the crime of having conspired unlawfully, wilfully and fraudulently to deprive certain negro citizens, on account of their race and color, of a right to vote at a general election held in that State in 1910, they being entitled to vote under the state law and which right was secured to them by the Fifteenth Amendment to the Constitution of the United States. The prosecution was directly concerned with § 5508, Rev. Stat., now § 19 of the Penal Code which is as follows:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

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We concentrate and state from the certificate only matters which we deem essential to dispose of the questions asked.

Suffrage in Oklahoma was regulated by § 1, Article III of the Constitution under which the State was admitted into the Union. Shortly after the admission there was submitted an amendment to the Constitution making a radical change in that article which was adopted prior to November 8, 1910. At an election for members of Congress which followed the adoption of this Amendment certain election officers in enforcing its provisions refused to allow certain negro citizens to vote who were clearly entitled to vote under the provision of the Constitution under which the State was admitted, that is, before the amendment, and who, it is equally clear, were not entitled to vote under the provision of the suffrage amendment if that amendment governed. The persons so excluded based their claim of right to vote upon the original Constitution and upon the assertion that the suffrage amendment was void because in conflict with the prohibitions of the Fifteenth Amendment and therefore afforded no basis for denying them the right guaranteed and protected by that Amendment. And upon the assumption that this claim was justified and that the election officers had violated the Fifteenth Amendment in denying the right to vote, this prosecution, as we have said, was commenced. At the trial the court instructed that by the Fifteenth Amendment the States were prohibited from discriminating as to suffrage because of race, color, or previous condition of servitude and that Congress in pursuance of the authority which was conferred upon it by the very terms of the Amendment to enforce its provisions had enacted the following (Rev. Stat., § 2004):

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people of any State, Territory, district, . . . municipality, . . . or

other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."

It then instructed as follows:

"The State amendment which imposes the test of reading and writing any section of the State constitution as a condition to voting to persons not on or prior to January 1, 1866, entitled to vote under some form of government, or then resident in some foreign nation, or a lineal descendant of such person, is not valid, but you may consider it in so far as it was in good faith relied and acted upon by the defendants in ascertaining their intent and motive. If you believe from the evidence that the defendants formed a common design and coöperated in denying the colored voters of Union Township precinct, or any of them, entitled to vote, the privilege of voting, but this was due to a mistaken belief sincerely entertained by the defendants as to the qualifications of the voters—that is, if the motive actuating the defendants was honest, and they simply erred in the conception of their duty—then the criminal intent requisite to their guilt is wanting and they cannot be convicted. On the other hand, if they knew or believed these colored persons were entitled to vote, and their purpose was to unfairly and fraudulently deny the right of suffrage to them, or any of them entitled thereto, on account of their race and color, then their purpose was a corrupt one, and they cannot be shielded by their official positions."

The questions which the court below asks are these:

"1. Was the amendment to the constitution of Oklahoma, heretofore set forth, valid?

"2. Was that amendment void in so far as it attempted to debar from the right or privilege of voting for a qualified

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candidate for a Member of Congress in Oklahoma, unless they were able to read and write any section of the constitution of Oklahoma, negro citizens of the United States who were otherwise qualified to vote for a qualified candidate for a Member of Congress in that State, but who were not, and none of whose lineal ancestors was, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, because they were then slaves?"

As these questions obviously relate to the provisions concerning suffrage in the original constitution and the amendment to those provisions which forms the basis of the controversy, we state the text of both. The original clause so far as material was this:

"The qualified electors of the State shall be male citizens of the United States, male citizens of the State, and male persons of Indian descent native of the United States, who are over the age of twenty-one years, who have resided in the State one year, in the county six months, and in the election precinct thirty days, next preceding the election at which any such elector offers to vote."

And this is the amendment:

"No person shall be registered as an elector of this State or be allowed to vote in any election herein, unless he be able to read and write any section of the constitution of the State of Oklahoma; but no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution. Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the

precinct election officer when electors apply for ballots to vote."

Considering the questions in the light of the text of the suffrage amendment it is apparent that they are twofold because of the twofold character of the provisions as to suffrage which the amendment contains. The first question is concerned with that provision of the amendment which fixes a standard by which the right to vote is given upon conditions existing on January 1, 1866, and relieves those coming within that standard from the standard based on a literacy test which is established by the other provision of the amendment. The second question asks as to the validity of the literacy test and how far, if intrinsically valid, it would continue to exist and be operative in the event the standard based upon January 1, 1866, should be held to be illegal as violative of the Fifteenth Amendment.

To avoid that which is unnecessary let us at once consider and sift the propositions of the United States on the one hand and of the plaintiffs in error on the other, in order to reach with precision the real and final question to be considered. The United States insists that the provision of the amendment which fixes a standard based upon January 1, 1866, is repugnant to the prohibitions of the Fifteenth Amendment because in substance and effect that provision, if not an express, is certainly an open repudiation of the Fifteenth Amendment and hence the provision in question was stricken with nullity in its inception by the self-operative force of the Amendment, and as the result of the same power was at all subsequent times devoid of any vitality whatever.

For the plaintiffs in error on the other hand it is said the States have the power to fix standards for suffrage and that power was not taken away by the Fifteenth Amendment but only limited to the extent of the prohibitions which that Amendment established. This being true, as the

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standard fixed does not in terms make any discrimination on account of race, color, or previous condition of servitude, since all, whether negro or white, who come within its requirements enjoy the privilege of voting, there is no ground upon which to rest the contention that the provision violates the Fifteenth Amendment. This, it is insisted, must be the case unless it is intended to expressly deny the State's right to provide a standard for suffrage, or what is equivalent thereto, to assert: *a*, that the judgment of the State exercised in the exertion of that power is subject to Federal judicial review or supervision, or *b*, that it may be questioned and be brought within the prohibitions of the Amendment by attributing to the legislative authority an occult motive to violate the Amendment or by assuming that an exercise of the otherwise lawful power may be invalidated because of conclusions concerning its operation in practical execution and resulting discrimination arising therefrom, albeit such discrimination was not expressed in the standard fixed or fairly to be implied but simply arose from inequalities naturally inhering in those who must come within the standard in order to enjoy the right to vote.

On the other hand the United States denies the relevancy of these contentions. It says state power to provide for suffrage is not disputed, although, of course, the authority of the Fifteenth Amendment and the limit on that power which it imposes is insisted upon. Hence, no assertion denying the right of a State to exert judgment and discretion in fixing the qualification of suffrage is advanced and no right to question the motive of the State in establishing a standard as to such subjects under such circumstances or to review or supervise the same is relied upon: and no power to destroy an otherwise valid exertion of authority upon the mere ultimate operation of the power exercised is asserted. And applying these principles to the very case in hand the argument of the

Government in substance says: No question is raised by the Government concerning the validity of the literacy test provided for in the amendment under consideration as an independent standard since the conclusion is plain that that test rests on the exercise of state judgment and therefore cannot be here assailed either by disregarding the State's power to judge on the subject or by testing its motive in enacting the provision. The real question involved, so the argument of the Government insists, is the repugnancy of the standard which the amendment makes, based upon the conditions existing on January 1, 1866, because on its face and inherently considering the substance of things, that standard is a mere denial of the restrictions imposed by the prohibitions of the Fifteenth Amendment and by necessary result re-creates and perpetuates the very conditions which the Amendment was intended to destroy. From this it is urged that no legitimate discretion could have entered into the fixing of such standard which involved only the determination to directly set at naught or by indirection avoid the commands of the Amendment. And it is insisted that nothing contrary to these propositions is involved in the contention of the Government that if the standard which the suffrage amendment fixes based upon the conditions existing on January 1, 1866, be found to be void for the reasons urged, the other and literacy test is also void, since that contention rests, not upon any assertion on the part of the Government of any abstract repugnancy of the literacy test to the prohibitions of the Fifteenth Amendment, but upon the relation between that test and the other as formulated in the suffrage amendment and the inevitable result which it is deemed must follow from holding it to be void if the other is so declared to be.

Looking comprehensively at these contentions of the parties it plainly results that the conflict between them is

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much narrower than it would seem to be because the premise which the arguments of the plaintiffs in error attribute to the propositions of the United States is by it denied. On the very face of things it is clear that the United States disclaims the gloss put upon its contentions by limiting them to the propositions which we have hitherto pointed out, since it rests the contentions which it makes as to the assailed provision of the suffrage amendment solely upon the ground that it involves an unmistakable, although it may be a somewhat disguised, refusal to give effect to the prohibitions of the Fifteenth Amendment by creating a standard which it is repeated but calls to life the very conditions which that Amendment was adopted to destroy and which it had destroyed.

The questions then are: (1) Giving to the propositions of the Government the interpretation which the Government puts upon them and assuming that the suffrage provision has the significance which the Government assumes it to have, is that provision as a matter of law repugnant to the Fifteenth Amendment? which leads us of course to consider the operation and effect of the Fifteenth Amendment. (2) If yes, has the assailed amendment in so far as it fixes a standard for voting as of January 1, 1866, the meaning which the Government attributes to it? which leads us to analyze and interpret that provision of the amendment. (3) If the investigation as to the two prior subjects establishes that the standard fixed as of January 1, 1866, is void, what if any effect does that conclusion have upon the literacy standard otherwise established by the amendment? which involves determining whether that standard, if legal, may survive the recognition of the fact that the other or 1866 standard has not and never had any legal existence. Let us consider these subjects under separate headings.

1. *The operation and effect of the Fifteenth Amendment.*
This is its text:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

(a) Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support and both the authority of the nation and the State would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.

(b) But it is equally beyond the possibility of question that the Amendment in express terms restricts the power of the United States or the States to abridge or deny the right of a citizen of the United States to vote on account of race, color or previous condition of servitude. The restriction is coincident with the power and prevents its exertion in disregard of the command of the Amendment. But while this is true, it is true also that the Amendment does not change, modify or deprive the States of their full power as to suffrage except of course as to the subject with which the Amendment deals and to the extent that obedience to its command is necessary. Thus the authority over suffrage which the States possess and the limitation which the Amendment imposes are cōordinate and one may not destroy the other without bringing about the destruction of both.

(c) While in the true sense, therefore, the Amendment

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gives no right of suffrage, it was long ago recognized that in operation its prohibition might measurably have that effect; that is to say, that as the command of the Amendment was self-executing and reached without legislative action the conditions of discrimination against which it was aimed, the result might arise that as a consequence of the striking down of a discriminating clause a right of suffrage would be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out. *Ex parte Yarbrough*, 110 U. S. 651; *Neal v. Delaware*, 103 U. S. 370. A familiar illustration of this doctrine resulted from the effect of the adoption of the Amendment on state constitutions in which at the time of the adoption of the Amendment the right of suffrage was conferred on all white male citizens, since by the inherent power of the Amendment the word white disappeared and therefore all male citizens without discrimination on account of race, color or previous condition of servitude came under the generic grant of suffrage made by the State.

With these principles before us how can there be room for any serious dispute concerning the repugnancy of the standard based upon January 1, 1866 (a date which preceded the adoption of the Fifteenth Amendment), if the suffrage provision fixing that standard is susceptible of the significance which the Government attributes to it? Indeed, there seems no escape from the conclusion that to hold that there was even possibility for dispute on the subject would be but to declare that the Fifteenth Amendment not only had not the self-executing power which it has been recognized to have from the beginning, but that its provisions were wholly inoperative because susceptible of being rendered inapplicable by mere forms of expression embodying no exercise of judgment and resting upon no discernible reason other than the purpose to disregard the prohibitions of the Amendment by creating a standard of

voting which on its face was in substance but a revitalization of conditions which when they prevailed in the past had been destroyed by the self-operative force of the Amendment.

2. *The standard of January 1, 1866, fixed in the suffrage amendment and its significance.*

The inquiry of course here is, Does the amendment as to the particular standard which this heading embraces involve the mere refusal to comply with the commands of the Fifteenth Amendment as previously stated? This leads us for the purpose of the analysis to recur to the text of the suffrage amendment. Its opening sentence fixes the literacy standard which is all-inclusive since it is general in its expression and contains no word of discrimination on account of race or color or any other reason. This however is immediately followed by the provisions creating the standard based upon the condition existing on January 1, 1866, and carving out those coming under that standard from the inclusion in the literacy test which would have controlled them but for the exclusion thus expressly provided for. The provision is this:

"But no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution."

We have difficulty in finding words to more clearly demonstrate the conviction we entertain that this standard has the characteristics which the Government attributes to it than does the mere statement of the text. It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude prohibited by the Fifteenth Amendment, but the standard itself inherently brings that result into existence since it is based

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purely upon a period of time before the enactment of the Fifteenth Amendment and makes that period the controlling and dominant test of the right of suffrage. In other words, we seek in vain for any ground which would sustain any other interpretation but that the provision, recurring to the conditions existing before the Fifteenth Amendment was adopted and the continuance of which the Fifteenth Amendment prohibited, proposed by in substance and effect lifting those conditions over to a period of time after the Amendment to make them the basis of the right to suffrage conferred in direct and positive disregard of the Fifteenth Amendment. And the same result, we are of opinion, is demonstrated by considering whether it is possible to discover any basis of reason for the standard thus fixed other than the purpose above stated. We say this because we are unable to discover how, unless the prohibitions of the Fifteenth Amendment were considered, the slightest reason was afforded for basing the classification upon a period of time prior to the Fifteenth Amendment. Certainly it cannot be said that there was any peculiar necromancy in the time named which engendered attributes affecting the qualification to vote which would not exist at another and different period unless the Fifteenth Amendment was in view.

While these considerations establish that the standard fixed on the basis of the 1866 test is void, they do not enable us to reply even to the first question asked by the court below, since to do so we must consider the literacy standard established by the suffrage amendment and the possibility of its surviving the determination of the fact that the 1866 standard never took life since it was void from the beginning because of the operation upon it of the prohibitions of the Fifteenth Amendment. And this brings us to the last heading:

3. *The determination of the validity of the literacy test and the possibility of its surviving the disappearance of the 1866*

standard with which it is associated in the suffrage amendment.

No time need be spent on the question of the validity of the literacy test considered alone since as we have seen its establishment was but the exercise by the State of a lawful power vested in it not subject to our supervision, and indeed, its validity is admitted. Whether this test is so connected with the other one relating to the situation on January 1, 1866, that the invalidity of the latter requires the rejection of the former is really a question of state law, but in the absence of any decision on the subject by the Supreme Court of the State, we must determine it for ourselves. We are of opinion that neither forms of classification nor methods of enumeration should be made the basis of striking down a provision which was independently legal and therefore was lawfully enacted because of the removal of an illegal provision with which the legal provision or provisions may have been associated. We state what we hold to be the rule thus strongly because we are of opinion that on a subject like the one under consideration involving the establishment of a right whose exercise lies at the very basis of government a much more exacting standard is required than would ordinarily obtain where the influence of the declared unconstitutionality of one provision of a statute upon another and constitutional provision is required to be fixed. Of course, rigorous as is this rule and imperative as is the duty not to violate it, it does not mean that it applies in a case where it expressly appears that a contrary conclusion must be reached if the plain letter and necessary intendment of the provision under consideration so compels, or where such a result is rendered necessary because to follow the contrary course would give rise to such an extreme and anomalous situation as would cause it to be impossible to conclude that it could have been upon any hypothesis whatever within the mind of the law-making power.

Does the general rule here govern or is the case controlled by one or the other of the exceptional conditions which we have just stated, is then the remaining question to be decided. Coming to solve it we are of opinion that by a consideration of the text of the suffrage amendment in so far as it deals with the literacy test and to the extent that it creates the standard based upon conditions existing on January 1, 1866, the case is taken out of the general rule and brought under the first of the exceptions stated. We say this because in our opinion the very language of the suffrage amendment expresses, not by implication nor by forms of classification nor by the order in which they are made, but by direct and positive language the command that the persons embraced in the 1866 standard should not be under any conditions subjected to the literacy test, a command which would be virtually set at naught if on the obliteration of the one standard by the force of the Fifteenth Amendment the other standard should be held to continue in force.

The reasons previously stated dispose of the case and make it plain that it is our duty to answer the first question, No, and the second, Yes; but before we direct the entry of an order to that effect we come briefly to dispose of an issue the consideration of which we have hitherto postponed from a desire not to break the continuity of discussion as to the general and important subject before us.

In various forms of statement not challenging the instructions given by the trial court concretely considered concerning the liability of the election officers for their official conduct, it is insisted that as in connection with the instructions the jury was charged that the suffrage amendment was unconstitutional because of its repugnancy to the Fifteenth Amendment, therefore taken as a whole the charge was erroneous. But we are of opinion that this contention is without merit, especially in view

of the doctrine long since settled concerning the self-executing power of the Fifteenth Amendment and of what we have held to be the nature and character of the suffrage amendment in question. The contention concerning the inapplicability of § 5508, Rev. Stat., now § 19 of the Penal Code, or of its repeal by implication, is fully answered by the ruling this day made in *United States v. Mosley*, No. 180, *post*, p. 383.

We answer the first question, No, and the second question, Yes.

And it will be so certified.

MR. JUSTICE McREYNOLDS took no part in the consideration and decision of this case.
